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PROGRESS IN CODE REVISION

The time allotted by the legislature for the completion of the work of the commission appointed to revise the statutory laws of Iowa has almost expired. In the belief that the progress and work of the commission is of interest to the Iowa bar, the Bulletin has secured the following statement of the commission's work from Hon. James H. Trewin, of Cedar Rapids, its chairman.

Chapter 50 of the Acts of the 38th General Assembly created a code commission, and defined its duties to be substantially as follows:

First: To prepare and cause to be printed a compilation of the general laws of the state, and submit the same to an extra session of the General Assembly to be called by the governor early in the year 1920.

Second: To point out to the General Assembly inconsistencies and defects in the law, and to recommend such changes as might be deemed by the commission for the public welfare.

In pursuance of this authority, the commission has prepared a compiled code of the state, and in doing so found it necessary to rearrange, retitlize, and rechapterize the laws, and, of course, to give such matter new section numbers. For the purpose of amending, revising, and codifying the laws, the compiled code will take the place of the code of 1897, the supplements of 1913 and 1915, and the session laws of the 37th and 38th general assemblies. The compilation has been completed and will shortly be bound and ready for distribution.

The commission will also print in connection with the compiled code a table of corresponding sections, the first column of which will give the numbers of the sections in the code of 1897, the supplements, and the session laws, in consecutive order, and the second

column the section of the compiled code where the matter is to be found.

The commission, after much consideration, concluded that the most feasible way of presenting to the General Assembly its report of defects, inconsistencies, and suggestions for amendments which would improve the laws would be in the form of a series of code commissioners' bills, and the commission is now engaged in the preparation of such bills. Therefore, there will not be presented to the General Assembly an entire proposed code, as was done by the commission appointed prior to the adoption of the code of 1897, but instead the commission will present the matter in the much more definite and concrete way of bills to cure defects in particular sections, chapters, or titles, as the case may be, with references in the bills to the sections of the compiled code which are affected by the bills. It goes without saying that the subject matter of many sections of the code will be left unchanged, although their numbering and arrangement with relation to other sections may be different.

At the opening of the session, all these bills will constitute a part of the report of the commission, and will be printed separately from the report and laid on the desks of the members of the legislature, so that immediately upon assembling the General Assembly, if it so desires, may introduce the bills, and have them referred to the appropriate committees and begin work at once.

The members will be able to take any section of any bill, and by the use of the table and the references at the end of the section in the bill, readily determine what the law was and what changes in verbiage or otherwise the commission proposes to make.

It will be apparent from this comparison what changes have been made, and the reasons for the changes in most cases will be apparent. In cases, however, where the commission deems it advisable to introduce new matter, there will be a notation to that effect at the end of the section of the bill, and the commission will cover the subject in a general way in the part of its report which will deal with the general subject of amendment, revision, and codification.

The commission employed Professor Jacob Van der Zee, of the State University of Iowa, to prepare the index, and he has been working at it continuously from shortly after the organization of the commission in March. The commission sought advice from law publishers as to the preparation of indices of statutes, and procured copies of the indices of the statutes of New York and Illinois, which were pronounced by competent authorities to be among the very

best extant. It is expected that the index will be more useful to the searcher than the complicated one in the supplement of 1915.

Immediately after its organization, the code commission issued letters to the judges, lawyers, state and local officials, bankers, and organizations of various kinds in the state, asking for suggestions in reference to its work along the line of curing defects and improving the laws, and as a result has received many valuable suggestions which have been adopted. The commission has also received great assistance through a series of conferences with many persons whose interest is to improve our laws. The commission is not, however, likely to recommend any radical changes in the laws, or bills upon matters which have been the subject of controversy heretofore, believing that such recommendations are not within its province.

The bills which the commission has in course of preparation have been submitted to various persons and officials, including members of the General Assembly, with a view of criticism and improvement, and much assistance has been obtained.

As soon as the bills have been printed, advance copies will be distributed to the members of the General Assembly, and to others, with a view of further criticism and improvement, so that before final submission to the General Assembly defects in the bills may be discovered and remedied.

The following is a copy of Bill No. 1 of the code commissioners, and shows the form in which changes in the law proposed by the commission are to be submitted to the legislature. This was given the Bulletin through the courtesy of Mr. Trewin.

Senate File No.....	Code Commissioners' Bill No. 1
House File No.	Subject: Forms of Bills
By	Referred to.....
	Date

A BILL FOR

AN ACT to amend, revise and codify sections forty-two (42) and forty-three (43) of the compiled code of Iowa, relating to the citation and form of bills for the amendment, revision, codification or repeal, of statutes.

Be it enacted by the General Assembly of the State of Iowa:

That sections forty-two (42) and forty-three (43) of the compiled code of Iowa are amended, revised and codified to read as follows:

SEC. 1. *Citation of Compiled Code.* The compilation of the

laws of Iowa, prepared by the code commission appointed under the provisions of chapter fifty (50) of the acts of the thirty-eighth general assembly, shall be known and cited as the "Compiled Code".

(C. C. 42, 43, modified)

SEC. 2. *Citation of Permanent Code.* The permanent code to be published after the adjournment of the extra session of the thirty-eighth general assembly shall be known and cited as "The Code".

(C. C. 42, 43, modified)

SEC. 3. *Citation of Prior Codes.* All prior codes and supplements shall be cited by the year in which published.

(C. C. 42, 43, modified)

SEC. 4. *Citation of Session Laws.* The session laws of each general assembly shall be known and cited as ".....General Assembly, Chapter....., Section....." (inserting the appropriate number).

(C. C. 42, 43, modified)

SEC. 5. *Citation of Future Supplements.* Any supplements to the code which may hereafter be issued under authority of law, shall be known and cited as "Code Supplement," (inserting the year of publication).

(C. C. 42, 43, modified)

SEC. 6. *Forms of Bills for Acts.* Bills designed to amend, revise, codify or repeal any law which appears in the compiled code, "The Code", or any supplement thereto, or any session laws, shall refer as follows:

1. Those relating to sections of any code or supplement, to the section, by number.

2. Those relating to any chapter of any code or supplement, to such chapter and the number of the title in which it appears, by number.

3. Those relating to any act of the general assembly not appearing in any code or supplement, to the general assembly, the number of the chapter, and section, by number.

4. All references shall be expressed in words followed by the numerals in parentheses, and if omitted, the reporter of the supreme court in preparing acts for publication in the session laws, shall supply the same.

(C. C. 42, 43, modified)

SEC. 7. *Length of Sections—Sections to be Germane.* Where practicable, sections of bills shall not exceed sixteen (16) lines in

length and shall be germane to the title, chapter or section to which they relate.

(New)

SEC. 8. *Compiled Code.* The compiled code submitted to the general assembly as a part of the code commissioners' report is adopted as the official code of Iowa, for convenience of reference in bills relating to the amendment, revision and codification of the laws; but this section shall not be construed as changing the meaning of any law.

(New)

SEC. 9. *Title.* The title of all bills to amend, revise and codify the laws shall be substantially as follows: "A bill for an act to amend, revise and codify title....., or chapter..... of title....., or section....., as the case may be, of the compiled code of Iowa, relating to (naming the subject matter in general terms)."

(New)

SEC. 10. *Enacting Clause.* The enacting clause of such bills shall be substantially as follows: "Be it enacted by the general assembly of the state of Iowa that title....., or chapter....., of title....., or section....., as the case may be, of the compiled code of Iowa, is amended, revised and codified to read as follows: (Here let sections of the bill follow in numerical order)."

(New)

SEC. 11. *Head Notes and Citations.* The proper head notes shall be placed at the beginning of each section of the bills, and at the end of the section shall be the reference to the section number of the compiled code from which the matter of the bill was taken, but neither said head notes, nor the numbers of the sections of the bills, nor said historical references shall be considered as a part of the law as enacted.

(New)

UNWHOLESOME FOOD AS A SOURCE OF LIABILITY

THE ENGLISH RULE

Pure food legislation is not an altogether modern idea. As far back as the year 1266 we find the Statute of Pillory and Tumbrel and of the assize of Bread and Ale¹ in which "it is ordained that none shall sell corrupt victuals".² This ancient statute was thought by Baron Parke³ to have been the cause of the language in the early authorities⁴ suggesting that the sale of victuals differed from the sale of other articles in that the vendor of the former might be liable without fraud or warranty.⁵ The learned jurist was confident that there was, in the early law, no difference here except such as was resultant from this legislation, the possibility that the same cause which produced the statute might also have tended to introduce a peculiar rule into the law of sales not being considered by him. Nor did he lend his attention to the oft-quoted sentence of Blackstone⁶ which was urged in the argument of counsel,⁷ reading, "In contracts for provisions it is always implied that they are wholesome; and, if they be not, the same remedy may be had." The position of counsel was that this statement is authority for the theory that the seller of food impliedly warrants that it is sound and fit for human consumption, and is liable to a buyer who is injured because of its unwholesomeness, whether or not the seller knew of the defect.⁸ The sale in the case at issue was between two farmers, and not in the ordinary course of trade, so that the decision is merely that no such warranty is implied where the seller

¹ 51 Hen. III. Stat. 6. "If a Baker or Brewer be convict because he hath not observed the Assize of Bread and Ale, the first, second and third time, he shall be amerced according to his Offence, if it be not over grievous; (2) but if the Offence be grievous and often, and will not be corrected, then he shall suffer Punishment of the Body, that is to wit, a Baker to the Pillory and a Brewer to the Tumbrel, or some other correction III also if there be any that sell by one Measure and buy by another. Also if any do use false Ells, Weights, or Measures. (2) And if any Butcher do sell contagious Flesh, or that died of the Murren. . . .'. I Pickering's Statutes 47, 49.

² 4 Inst. 261.

³ *Burnby v. Bollett*, (1847) 16 M. & W. 644. See also WILLISTON ON SALES, §241 and note 82.

⁴ See *infra*.

⁵ *Burnby v. Bollett*, *supra*, p. 653.

⁶ III Blk. Comm. 165.

⁷ *Burnby v. Bollett*, *supra*, p. 649.

⁸ *Ibid.*, pp. 645 to 649.

"was not dealing in the way of a common trader".⁹ But in spite of Parke's theory that there is no peculiarity in the law of sales in this respect, except such as is produced by this criminal statute, he inclined to the view that a dealer would be liable for unknowingly selling corrupt victuals, as shown by his statement interposed during argument of counsel,¹⁰ "This is not the case of a butcher, or taverner, or farmer killing or exposing to sale meat in open market, who may be reasonably taken as impliedly warranting the meat to be sound."

Blackstone's statement has been accepted frequently as authority for the existence of such a warranty,¹¹ while on the other hand it has been said to be an "unsupported *dictum* borrowed probably from the civil law".¹²

It has been suggested that these opposing reactions are based upon a common error. "The same remedy" which he states "may be had" if the provisions are not wholesome, refers to an action on the case in the nature of deceit, as shown by the sentence which precedes the one quoted. This leads one author¹³ to conclude that this "proposition clearly assumes knowledge of the unwholesomeness on the part of the vendor, for that knowledge is an essential element in the action for deceit, as settled in *Pasley v. Freeman* and the cases there cited, and others which have since been determined on its authority." The argument is that although Blackstone said that "in contracts for provisions it is always implied that they are wholesome", since he adds in the next clause that if they are not the "same remedy may be had", which remedy refers to a previous statement in which he was talking of an action on the case in the nature of deceit, the obvious meaning is that it is implied that they are wholesome if the seller knows otherwise. Whether or not we might be justified in resorting to such a construction in order to restrict the authority of a decided case, its use when we are trying

⁹ *Ibid.*, p. 655.

¹⁰ *Ibid.*, p. 649.

¹¹ WILLISTON ON SALES, §241 and cases cited in note 84. See also 27 Yale L. J. 1068, 1070 and cases cited.

¹² In *Wright v. Hart*, (1837) 18 Wend. (N. Y.) 449, 464. (Opinion of Senator Tracy.)

¹³ BENJAMIN ON SALES, 7th ed., p. 658. While this author seems to overlook the distinction between the action of deceit and an action on the case for damages for deceit, this does not affect his proposition that in Blackstone's time knowledge was required for the latter also, because the case upon which he relies (*Pasley v. Freeman*, (1789) 3 T. R. 51) was an action on the case in the nature of deceit and was decided two decades after the Commentaries were written.

to find out what was really in an author's mind is unsound. The argument is worthy of consideration as some evidence that the writer meant to restrict his statement to this extent. But to declare by an arbitrary rule of construction that it clearly assumes this, is wholly without justification. It is fully as reasonable to suppose that Blackstone overlooked that the remedy to which he made reference was inadequate for the rule he had stated, as that he intended his plain language to have a meaning different from its face value, in this obscure way.

As to the proposition that the one who knowingly sold unwholesome food was liable without express warranty, there can be no question that it is supported by early authorities. In a case in the Year Book¹⁴ in which a *scienter* was alleged, Martin and Babington said that a warranty of soundness by a seller of provisions was unnecessary. In another¹⁵ Brian said, "if I sell mutton for food which is unsound, he shall have action for deceit, although I did not warrant it." Likewise in *Roswell v. Vaughan*,¹⁶ Tanfield and Altham were of opinion that "if a man sell victuals which is corrupt, without warranty, an action lies." This was a dictum in an action on the case in the nature of deceit, and hence here, as in the case previously cited where "he shall have an action for deceit" and the first one in which *scienter* was alleged, it is arguable that liability for knowingly selling "corrupt victuals" is all that is meant. But quite evidently Frowicke had no such limitation in mind when he said that¹⁷ "no man can justify selling corrupt victual, but action on the case lies against the seller whether the victual was warranted to be good or not", for he adds that if he sells cloth or other thing he is liable only if he knew of the defect or gave a warranty. This as we have seen was the opinion of Baron Parke in *Burnby v. Bollett*,¹⁸ and it is at least as reasonable to suppose that it was what Blackstone had in mind as that he intended to restrict it by reference to a remedy that he had mentioned in the preceding sentence.

Hence it cannot be said that there was no tendency to introduce into the English law the rule that the dealer of foodstuffs is answerable for their wholesomeness, however ignorant he may be of de-

¹⁴ 9 Hen. 6. 53, pl. 37.

¹⁵ 11 Edw. 4. 6, pl. 10.

¹⁶ (1608) Cro. Jac. 196.

¹⁷ (1517) Keilway, 91.

¹⁸ *Supra*, p. 649.

fects. But the cases do not justify us in saying that this tendency resulted in the actual adoption of such a rule. For instance in *Emmerton v. Matthews*¹⁹ the defendant exposed for sale in Newgate Market a carcass which "appeared to be good meat" and was purchased by the plaintiff who believed that it was such. Because of a latent defect which did not appear until the meat was cooked "it was not fit for human food". There was no express warranty, but the plaintiff attempted to recover upon an implied warranty that the carcass was "fit for human food". Yet, although all the old cases and texts were cited to the court it was held that there was no such warranty in a case of this kind.²⁰ The statement is made that²¹ "a salesman offering for sale a carcass with a defect, of which he is not only ignorant, but has not any means of knowledge (the defect being latent), is not liable to any penalty,²² and does not as a matter of law impliedly warrant that the carcass is fit for human food". *Smith v. Baker*²³ merely follows *Emmerton v. Matthews*, in denying the existence of an implied warranty under similar facts, except that it throws out a suggestion which was destined to frame the English rule upon this subject: namely, that the reason that no warranty is there implied is because there

¹⁹ (1862) 7 H. & N. 586.

²⁰ As a matter of fact this case involved a sale from one dealer to another, not to a buyer for immediate consumption, but while this would make a great difference in American cases, it is a distinction which has not been recognized by the English as far as the rule is concerned. It might be found that the buyer "relied on the skill and judgment of the seller" if he were a consumer more readily than if he were a dealer, but this involves applying the same rule to different sets of facts, not a different rule to be applied.

²¹ *Ibid.*, p. 592.

²² The reference "to any penalty" refers to the criminal statutes and is in line with the argument of Baron Parke in *Burnby v. Bollett*, *supra*, that whatever peculiar liability rests upon the seller of provisions is a resultant of such legislation. The theory, though not very clearly stated, seems to be that the law will imply a warranty that the sale is not in violation of these statutes. But while Parke suggested by way of dictum that such sellers were criminally liable "certainly if they knew the fact, and probably also if they did not", this court clearly rejects the latter notion, as shown not only by a remark by Channell, B., during the argument: "as a matter of public policy, the authorities may seize unwholesome meat, but it does not follow that the person who exposes it for sale is liable to the penalty if he did not know that it was unwholesome", but also by the statement in the decision that the seller without such knowledge "is not liable to any penalty". The possible argument that these statutes "are police regulations in the interest of public health, and do not make knowledge by the retailer a necessary element of the offense" as was said in *Sloan v. F. W. Woolworth Co.* (1915), 193 Ill. App. 620, of the Illinois pure food law, loses its force when applied to a statute which provided for such punishments as the Pillory and the Tumbrel.

²³ 40 L. T. (N. S.) 261.

was no reliance by the buyer upon the skill and judgment of the seller, the selection having been made by the former.²⁴

It is true that there are English cases holding an innocent seller of unwholesome food liable on an implied warranty,²⁵ but they do so, not by virtue of any rule peculiar to the sale of provisions, but by the development of general rules of implied warranty. A series of cases²⁶ led to the rule announced by Mellor, J., in *Jones v. Just*²⁷ that

"Where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer; there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied".

This rule was applied in *Randall v. Newson*,²⁸ in which the plaintiff recovered damages for injuries to his horses caused by a latent defect resulting in the breaking of a pole that he had ordered from a dealer, for a certain carriage. While the use of the word "particular" in the rule at the time of its inception, meant something more specific than is meant by saying that the purpose of food is to be eaten, the growth of the rule was such as to include exactly such situations.²⁹ With such a rule it is easy to understand why a judge would instruct a jury that the manufacturer of beer could not recover from the vendee, if the beer was "utterly bad and undrinkable, and therefore of no value at all".³⁰ Also, where a provision merchant agreed to provide provisions and stores for the troops and passengers of a certain vessel, this rule required that if the buyer relied on the selection of the seller, there was an implied warranty that the food should be wholesome and fit to eat;³¹ in which case, by the way, the judge takes particular pains to make it

²⁴ Here also the buyer was a dealer, but the decision is not that no warranty is implied in sales to a dealer, but that in this case the dealer relied upon his own skill and judgment. See note 20.

²⁵ *Harman v. Bennett*, (1858) 1 F. & F. 400; *Bigge v. Parkinson*, (1862) 7 H. & N. 955; *Beer v. Walker*, (1877) 46 L. J. C. P. 677; *Wallis v. Russell*, (1902) 2 Ir. R. 585; *Wren v. Holt*, (1903) 1 K. B. 610; *Frost v. Aylesbury Dairy Co., Ltd.*, (1905) 1 K. B. 608; *Jackson v. Watson & Sons*, (1909) 2 K. B. 193.

²⁶ *Gardiner v. Gray*, (1815) 4 Camp. 144; *Laing v. Fidgeon*, (1815) 6 Taunt. 108; *Gray v. Cox*, (1825) 4 B. & C. 108; *Jones v. Bright*, (1829) 5 Bing. 533.

²⁷ (1868) L. R. 3 Q. B. 197.

²⁸ (1877) 2 Q. B. D. 102, p. 109.

²⁹ This will receive further consideration presently.

³⁰ *Harmon v. Bennett*, (1858) 1 F. & F. 400.

³¹ *Bigge v. Parkinson*, (1862) 7 H. & N. 955.

clear that the result is reached by the application of the general rules of implied warranty.³² The case of *Beer v. Walker*³³ is along the same line except that it extends the warranty to include that the goods are in such condition, when sold to be transported, that they can reach the buyer in the ordinary course of transit without spoiling on the way. These have to do with executory transactions only, but the notion that the warranty was implied in such instances for the reason that the buyer was forced to rely upon the skill and judgment of the seller led to the extension of the rule of implied warranty to cases of executed sales in which such reliance was placed upon the skill and judgment of a seller who was a manufacturer of, or dealer in, the goods sold.³⁴

Hence when the law on this subject was codified by the Sale of Goods Act in 1893³⁵ it was provided³⁶ that

"Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale,³⁷ except as follows:—

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies upon the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not) there is an implied condition that the goods shall be reasonably fit for such purpose"³⁸

The cases decided under the Act indicate that no change has been introduced into this part of the law thereby, and that the dealer of

³² During the argument Cockburn, C. J., remarked that "there is no difference in this respect between goods to be manufactured and provisions to be supplied", and in delivering the opinion of the court, after stating the general rule, adds, "and I see no reason why the same warranty should not be comprehended in a contract for the sale of provisions".

³³ (1877) 46 L. J. C. P. 677.

³⁴ See the provisions of the Sale of Goods Act, *infra*, and the cases under it, which hold that this was a codification of the law as it previously existed.

³⁵ 56 & 57 Vict. Ch. 71.

³⁶ Sec. 14.

³⁷ This expression is apparently used to include a contract to sell and a sale. See *Wallis v. Russell*, (1902) 2 Ir. R. 585, which holds that a sale over the counter is controlled by this section. The Uniform Sales Act repeats this language except that for "contract of sale" it substitutes "contract to sell or a sale". See WILLISTON ON SALES, §227.

³⁸ The section continues, "provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose:

"(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed."

foodstuffs is liable to his vendee who has been injured by unwholesome food because this was an article purchased for a particular purpose, which was made known to the seller by the mere fact of the purchase, and which was impliedly warranted to be fit for that purpose because the buyer relied upon the skill or judgment of the seller.³⁹ Thus England has no rule of implied warranty which is in any respect peculiar to the sale of food.

THE AMERICAN RULE

In this country the notion that there is an implied warranty of wholesomeness in the sale of provisions for domestic use, rested for two-thirds of the nineteenth century upon dicta only.⁴⁰ Although not the first case in America involving a sale of food⁴¹ nor even the first to suggest this doctrine by dictum,⁴² the *Van Bracklin* case in 1815⁴³ is generally credited with having introduced this exception to *caveat emptor* into the United States. No difficulties were involved in that decision because it was a sale of a quarter of beef by one who knew the animal was diseased when slaughtered, which fact was not known to the buyer nor disclosed by the seller. The court, however, went beyond what was required to dispose of the issue before it, saying:

"In 3 Black. Com. 165 it is stated as a sound and elementary proposition, that in contracts for provisions, it is always implied that they are wholesome; and if they are not, case lies to recover damages for the deceit.

"In the sale of provisions for domestic use, the vendor is bound to know that they are sound and wholesome, at his peril. This is a principle, not only salutary, but necessary to the preservation of health and life."

³⁹ *Wallis v. Russell*, (1902) 2 Ir. R. 585; *Frost v. Aylesbury Dairy Co., Ltd.*, (1905) 1 K. B. 608; *Jackson v. Watson & Sons*, (1909) 2 K. B. 193. See also *Wren v. Holt*, (1903) 1 K. B. 610.

⁴⁰ *Moore v. McKinlay & Garrioch*, (1855) 5 Cal. 471; *Humphreys v. Comline*, (1847) 8 Blackf. (Ind.) 516; *Jones v. Murray*, (1825) 3 T. B. Mon. (Ky.) 83; *Marshall v. Peck*, (1833) 1 Dana (Ky.) 609; *Osgood v. Lewis*, (1829) 2 Har. & G. (Md.) 495; *Emerson v. Brigham*, (1913) 10 Mass. 197; *Windsor v. Lombard*, (1836) 18 Pick. (Mass.) 57; *Van Bracklin v. Fonda*, (1815) 12 Johns (N. Y.) 468; *Hart v. Wright*, (1837) 17 Wend. (N. Y.) 267; *Waring v. Mason*, (1837) 18 Wend. (N. Y.) 425; *Wright v. Hart*, (1837) 18 Wend. (N. Y.) 449; *Moses v. Mead*, (1845) 1 Denio (N. Y.) 378; *Moses v. Mead*, (1846) 5 Denio (N. Y.) 617; *Miller v. Scherder*, (1849) 2 N. Y. 262; *Hyland v. Sherman*, (1853) 2 E. D. Smith (N. Y.) 234; *Goldrich v. Ryan*, (1854) 3 E. D. Smith (N. Y.) 324; *Hoe v. Sanborn*, (1860) 21 N. Y. 552; *Divine v. McCormick*, (1867) 50 Barb. (N. Y.) 116; *Getty v. Rountree*, (1850) 2 Pinney (Wis.) 379; *Williams v. Slaughter*, (1854) 3 Wis. 347.

⁴¹ See *Bailey v. Nickols*, (1796) 2 Root (Conn.) 407.

⁴² See *Emerson v. Brigham*, (1813) 10 Mass. 197.

⁴³ *Van Bracklin v. Fonda*, *supra*.

This early dictum has been cited time and again by the courts, but the most remarkable phase of it has been largely overlooked. It is to be noticed that here the seller's liability is grounded, not upon the fact that his skill and judgment are relied upon by the buyer, as was seen to be the theory in England, but upon public policy. It is a rule "necessary to the preservation of health and life". Of the dicta that followed during the next half century, two seem to rest the rule upon the "reliance of the buyer" or at least upon the greater opportunity which the seller has to know his goods and the possible defects therein, which is the basis for this reliance.⁴⁴ But the great majority of those that expressed a reason for the position, followed the *Van Bracklin* suggestion of public policy,⁴⁵ some of them in no uncertain terms. In *Wright v. Hart*, Senator Maisson said:⁴⁶

"The law in relation to the sale of provisions stands upon an entirely different footing; there, out of regard to the health and the lives of men, the law always implies the article sold to be sound and wholesome, and fit for food. . . . This is a sound and salutary principle, and should be enforced with the most unyielding firmness".

Somewhat less emphatic is the position of Bronson,⁴⁷ but after the most unusual praise of the rule of *caveat emptor* he quotes the dictum from *Van Bracklin v. Fonda*, with its reason therefor, adding, "I find no difficulty in subscribing to that doctrine". The most exact statement of this theory was expressed by Judge Woodruff in *Hyland v. Sherman*⁴⁸ to the effect

"that it is at least doubtful whether the doctrine of implied warranty ought ever to obtain recognition, unless it be where immediate use for food is the object in view, in which case public policy, (having in view the health of the community rather than the particular pecuniary interest of the individual buyer,) seems to require such a protection against the sale of unwholesome provisions."

⁴⁴ *Windsor v. Lombard*, *supra*, at p. 62; *Hoe v. Sanborn*, *supra*, at pp. 560 and 561.

⁴⁵ *Marshall v. Peck*, (1833) 1 Dana (Ky.) 609; *Hart v. Wright*, (1837) 17 Wend. (N. Y.) 267; *Wright v. Hart*, (1837) 18 Wend. (N. Y.) 449, dissenting opinion by Senator Maisson on page 456. Senator Tracy questioned the existence of the rule (p. 464) but this was not accepted by Chancellor Walworth (see p. 454) who gave the only other written opinion and who voted with Tracy in the result. *Moses v. Mead*, (1845) 1 Denio (N. Y.) 378; *Moses v. Mead*, (1846) 5 Denio (N. Y.) 617; *Hyland v. Sherman*, (1853) 2 E. D. Smith (N. Y.) 234; *Goldrich v. Ryan*, (1854) 3 E. D. Smith (N. Y.) 324; *Divine v. McCormick*, (1867) 50 Barb. (N. Y.) 116.

⁴⁶ See note 45.

⁴⁷ C. J., in *Moses v. Mead*, 1 Denio *supra*, at page 388.

⁴⁸ *Supra*, at p. 238.

And Justice Hodgboom was of the opinion⁴⁹ "that sound policy and a proper regard to the public health would dictate an enlargement of the exception to the general rule".

In 1869 this problem was presented to the court squarely in *Hoover v. Peters*.⁵⁰ This suit involved the sale in open market of the carcasses of three hogs to be used as food by the buyers. The trial judge refused to instruct that the seller "was liable on an implied warranty of soundness, but on the other hand instructed the jury that where a person, as in this case, sells goods in open market, there is no such implied warranty, and no liability for faults in the absence of deceit, fraud or special warranty." This was held to be reversible error, Campbell, J., speaking for the court saying:⁵¹

"where articles of food are bought for consumption, and the vendor sells them for that express purpose, the consequences of unsoundness are so dangerous to health and life, and the failure of consideration is so complete, that we think the rule which has often been recognized, that such sales are warranted, is not only reasonable but essential to public safety. . . . The reason given by the New York authorities, in favor of health and personal safety, is much more satisfactory than the purely commercial considerations which take no account of these important interests."

There is no tendency on the part of the courts to withdraw from this position, and today

"It is a general rule, supported by the decided weight of authority, that, upon a retail sale of articles of food by a dealer directly to the consumer for domestic use and for immediate consumption, the law implies a warranty that such articles are sound and wholesome. Such is the rule of the common law and it is strengthened rather than impaired by the more modern decisions."⁵²

⁴⁹ *Divine v. McCormick*, *supra* at p. 118.

⁵⁰ 18 Mich. 51. Two years before in *Divine v. McCormick*, (1867) 50 Barb. (N. Y.) 116, it had been held that the vendor of food for domestic use was liable on an implied warranty of wholesomeness, but the court was helped by the fact that the vendor knew or had reason to suspect that the animal was diseased, and did not disclose this fact to the buyer. This point will be discussed hereafter.

⁵¹ p. 55.

⁵² *Flessner v. Carstens Packing Co.*, (1916) 93 Wash. 48 at p. 54. See also *Wiedeman v. Keller*, (1898) 171 Ill. 93; *Chapman v. Roggenkamp*, (1913) 182 Ill. App. 117; *Bark v. Dixon*, (1911) 115 Minn. 172; *Race v. Krum*, (1914) 146 N. Y. S. 197; *Leahy v. Essex Co.*, (1914) 148 N. Y. S. 1063; *Zenkel v. Oneida County Creameries Co.*, (1918) 171 N. Y. S. 676; *Race v. Krum*, (1918) 222 N. Y. 410. The rule is expressed by way of dictum in: *Lukens v. Fretund*, (1882) 27 Kan. 664, 666 and 669; *Doyle v. Fuerst & Kraemer*, (1911) 129 La. 838, 844; *French v. Vining*, (1869) 102 Mass. 132, 135; *Sinclair v. Hathaway*, (1885) 57 Mich. 60, 61; *Craft v. Parker, Webb & Co.*, (1893) 96 Mich. 245, 248; *Zielinski v. Potter*, (1917) 195 Mich. 90, 93; *Dulaney v. Jones*, (1911) 100 Miss. 835, 840; *Hart v. Wright*, (1837) 17 Wend. (N. Y.) 267, 273; *Money v. Fisher*, (1895) 92 Hun (N. Y.) 347, 348; *Cotton v. Reed*, (1898) 54 N. Y. S. 143, 144; *Kinch v. Haynes*, (1908) 58 Misc. Rep. (N. Y.) 499, 501;

And the reason therefor is that it is necessary for the proper protection of the health of the community,⁵³ or, as it was clearly stated in one of the most recent cases:⁵⁴ "This rule is based upon the high regard which the law has for human life."

Discussions of the theory underlying a well established rule of law are often purely academic. This is far from true in the present instance, for as will be seen presently, the courts have been led into error in two different respects by failing to recognize the marked distinction between the English theory and our own.

It is interesting to note that this rule, which had its origin among us in a New York dictum,⁵⁵ and which has found expression more frequently in that State than anywhere else,⁵⁶ has only there been seriously questioned in recent years. In *Race v. Krum* an implied warranty of wholesomeness was alleged by the plaintiff and admitted by the plea of the defendant. Woodward, J., dissented⁵⁷ from the decision affirming judgment for the plaintiff, on the ground that the evidence did not sustain the finding that the poisoning was caused by the food purchased⁵⁸ from the defendant, but goes out of his way to add:

"Whether, under a proper pleading, this court would be willing to hold that a person selling ice cream impliedly warranted the same to be free from poisonous ptomaines which could not be detected in the practical conduct of the business, and which no reasonable care could exclude, is purely academic here",

Swank v. Battaglia, (1917) 84 Or. 159, 162; *Catani v. Swift & Co.*, (1915) 251 Pa. 52, 55; *Bragg v. Morrill*, (1876) 49 Vt. 45, 47. It is assumed or implied in: *Nelson v. Armour Packing Co.*, (1905) 76 Ark. 352; *Askam v. Platt*, (1912) 85 Conn. 448; *Howard v. Emerson*, (1872) 110 Mass. 320; *Giroux v. Stedman*, (1888) 145 Mass. 439; *Baker v. Kamantowsky*, (1915) 188 Mich. 569; *Ryder v. Neitge*, (1874) 21 Minn. 70; *Battaglia v. Thomas*, (1893) 5 Tex. Civ. App. 563; *Warren v. Buck*, (1898) 71 Vt. 44. See *Hanson v. Hartse*, (1897) 70 Minn. 282, in which the court says that this warranty "if it exists at all" does not apply to the facts in that case (285); and *Goad v. Johnson*, (1871) 6 Heisk. (Tenn.) 340, where the statement is made (p. 346) that this rule "rests on statutory provisions, and not on the doctrine of implied warranty."

⁵³ *Wiedeman v. Keller*, (1898) 171 Ill. 93, 99; *Chapman v. Roggenkamp*, (1913) 182 Ill. App. 117, 121; *Lukens v. Freitund*, (1882) 27 Kan. 664, 669; *Hart v. Wright*, (1837) 17 Wend. (N. Y.) 267, 273; *Rinaldi v. Mohican Co.*, (1916) 157 N. Y. S. 561, 562; *Zenkel v. Oneida County Creameries Co.*, (1918) 171 N. Y. S. 676; *Catani v. Swift & Co.*, (1915) 251 Pa. 52, 57.

⁵⁴ *Race v. Krum*, (1918) 222 N. Y. 410, 415.

⁵⁵ *Van Bracklin v. Fonda*, *supra*.

⁵⁶ See notes 40, 45 and 52.

⁵⁷ 146 N. Y. S. 197, 199.

⁵⁸ The "sale" was of ice cream to be eaten at the counter. This aspect of the case will receive consideration later.

seeming inclined to doubt that the court would so hold. Shortly thereafter, Howard, J., who concurred in this dissent, said:⁵⁹

"Were this question being presented to this court for the first time, I should rebel vigorously against following, in this instance, the common law rule of implied warranty proclaimed as far back as the days of Blackstone and adhered to in this state, and quite generally in all the states of the Union. Many common law doctrines established centuries ago are rejected by the courts, as inapplicable to present-day conditions. The rule that there is an implied warranty on the part of the vendor of foodstuffs, that goods sold for immediate consumption are fit and wholesome, is a doctrine no longer suitable, I believe, to modern conditions. . . .

"This court, however, having so recently twice taken a contrary position on the subject, it would be better, I think, to allow the Court of Appeals to dispose of the question in this state".

Two years later the answer came. The suggestion in the dissenting opinion of Woodward in *Race v. Krum* had led to a motion for a reargument.⁶⁰ The court agreed "that an admission in a pleading of an implied warranty is not binding upon the defendant because it is an admission of a legal conclusion", but added: "The motion for reargument should be denied, however, because the majority of the court were of the opinion that as a matter of law, upon the sale of the ice cream by the defendant, there was an implied warranty that it was fit for consumption". The defendant then carried the case to the Court of Appeals where it was held,⁶¹ without dissent, that an implied warranty of wholesomeness accompanies such a sale.

SALES TO A DEALER

While the rule of implied warranty in the sale of provisions still rested on dicta only, a distinction was made between a sale of food as merchandise, that is, a transaction in which the purchaser bought to resell, and a sale in which the buyer purchased for his own consumption. This diversity first received clear expression in *Jones v. Murray*⁶² in 1825 where it was said:

"Blackstone indeed says, that 'in contracts for provisions, it is always implied that they are wholesome:' Black. Com., 166. This may be true where provisions are sold for consumption, and any prejudice ensues; but the law is otherwise where they are sold to merchandize. . . . In this case, the com-

⁵⁹ *Rinaldi v. Mohican Co.*, (1916) 157 N. Y. S. 561.

⁶⁰ *Race v. Krum*, (1914) 147 N. Y. S. 818.

⁶¹ *Race v. Krum*, (1918) 222 N. Y. 410.

⁶² 3 T. B. Mon. (Ky.) 83, 85.

plainants were . . . merchants, and they purchased not for consumption, but for merchandize. There was, therefore, no implied warranty".⁶³

The *Van Bracklin* dictum contains the phrase "in the sale of provisions for domestic use". Similar language has since been used as synonymous with "sale of provisions for consumption" as distinguished from "sale of provisions as merchandise".⁶⁴ This same dictum is relied upon to distinguish between food for man and stock feed⁶⁵ but it may have been that the court had the other point in mind.

A still earlier case contains language which seems to suggest this distinction, though somewhat vaguely. This was *Emerson v. Brigham*,⁶⁶ in 1813, which involved a sale between merchants. In holding that there was in this transaction no implied warranty, Sewell, J., after mentioning that Blackstone classed actions on implied warranties of the wholesomeness of food among cases of deceit, says:

"The difference is, that, in the case of provisions, the artifice is proved, when a victualler sells meat as fresh to his customers at a sound price, which at the time was stale or defective, or unwholesome from the state in which the animal died. For, in the nature of the bargain, the very offer to sell is a representation or affirmation of the soundness of the article, when nothing to the contrary is expressly stated; and his knowledge of the falsehood in this representation is also to be presumed from the nature and duties of his calling and trade.

"But cases may be supposed where, this presumption being repelled by contrary evidence, the seller would not be liable; as where a different representation is made; and this is proved directly, or is necessarily to be presumed from the nature of the article, the state of the market, or the circumstances."

As there was no direct representation to take this case out of the

⁶³ The court relies upon English authority for this position, saying: "This distinction is taken in the note to Fitzherbert's *Natura Brevium*, 84, the only authority to which Blackstone refers: 'Note (says the writer) a diversity between selling corrupt wines to merchandize, for there an action on the case does not lie without warranty; otherwise, if it be for a tavern or victualler, if it prejudice any,' and for this the year book of the 19th Henry 6, is cited." If such a distinction existed in the early English law, it eventually disappeared. With the rule that the warranty, when there is one, rests upon the buyer's reliance upon the seller's skill and judgment, it might be true that such reliance would be found more frequently where the buyer was a consumer than where he was a dealer, but it would be a problem of applying the rule to different facts, not a matter of a different rule to be applied. See *Grocer's Wholesale Co. v. Bostock*, 22 Ont. L. Rep. 130, 138, where Riddell, J., says, "I can see no difference between the Brighton tradesman and the plaintiffs at Hamilton, except that the plaintiffs sold to those who sold to the ultimate consumer, whereas the Englishman probably sold immediately to the consumer, and that distinction is, to my mind, of no importance."

⁶⁴ See especially *Moses v. Mead*, (1845) 1 Denio (N. Y.) 378, 388.

⁶⁵ *Lukens v. Freund*, (1882) 27 Kan. 664.

⁶⁶ *Emerson v. Brigham*, (1813) 10 Mass. 197.

rule, nor anything in the nature of the article (beef) nor in the state of the market, the peculiarity here must lie in the "other circumstances", the most important of which was that it was a transaction between merchants.

In *Hart v. Wright* it was stated *obiter* that in the case of a sale of foodstuffs between dealers there would be an implied warranty of wholesomeness.⁶⁷ But the decisions clearly show that the rule is not extended to such transactions.⁶⁸

Over-emphasis of this fact, however, may lead to two errors. If, wishing goods that he intends to resell as food, a dealer sends an order that is filled by an appropriation of certain goods to the contract, it is not necessary to resort to any rule peculiar to the sale of food to hold that the seller impliedly warrants that the goods so appropriated by him are merchantable articles of the description mentioned.⁶⁹ Nor can there be any doubt that food which is unfit to eat is unmerchantable as food. As it was well put in a recent case⁷⁰ involving such a transaction between dealers:

"There is abundant evidence that the beans could not be cooked, and, therefore, they were unfit for food. As they could not be cooked, they were not merchantable, because not fit for the purpose for which red-marrow beans are bought and sold. The doctrine of implied warranty plainly applies to a case like this."

Because a transaction which specifies the property by description only is so frequently an order to be filled, the courts have sometimes made the question of implied warranty depend upon whether the bargain was executed or executory. But as Williston has pointed out⁷¹

"an executory contract to sell may relate to a specified defined article and on the other hand an executed sale may relate to goods identified only by description. The distinction which the courts have in mind, therefore, is not

⁶⁷ (1837) 17 Wend. (N. Y.) 267, 268.

⁶⁸ *Baker v. Kamantowsky*, (1915) 188 Mich. 569; *Zielinski v. Potter*, (1917) 195 Mich. 90; *Ryder v. Neitge*, (1874) 21 Minn. 70; *Hanson v. Hartse*, (1897) 70 Minn. 282; *Moses v. Mead*, (1845) 1 Denio (N. Y.) 378; *Moses v. Mead*, (1846) 5 Denio (N. Y.) 617; *Hyland v. Sherman*, (1853) 2 E. D. Smith (N. Y.) 234; *Goldrich v. Ryan*, (1854) 3 E. D. Smith (N. Y.) 324; *Cotton v. Reed*, (1898) 54 N. Y. S. 143; *Kinch v. Haynes*, (1908) 58 Misc. Rep. (N. Y.) 499; *Wart v. Hoose*, (1909) 119 N. Y. S. 1107; *Good v. Johnson*, (1871) 6 Heisk. (Tenn.) 340; *Needham v. Dial*, (1893) 4 Tex. Civ. App. 141; *Warren v. Buck*, (1898) 71 Vt. 44.

⁶⁹ "Where there is a contract to sell goods by description, there is an implied warranty that the goods shall be merchantable." WILLISTON ON SALES, §234.

⁷⁰ *Grocery Co. v. Vernoy*, (1914) 167 N. C. 427, 429.

⁷¹ WILLISTON ON SALES, §230.

properly described as between executory contracts to sell and executed sales, but rather between bargains relating to specified property and bargains relating to property specified only by description. . . . If the contract is for the sale of goods specified only by description, and there are various grades and qualities of goods fulfilling that description, it is a reasonable construction of the bargain that goods of merchantable quality are intended."

In such instances there is no opportunity for the buyer to inspect, because if he could do so the bargain would relate to the particular goods that could be so inspected and not to goods which are identified by description only. The courts have gone further and inquired, if the bargain related to specified goods, whether there was an opportunity to inspect,⁷² although the implied warranty, if it exists in such a case, is an obligation added to the contract by law, rather than one found by an interpretation of the bargain.⁷³

But so intent have the courts been, at times, in showing that sales between dealers are not within the exception to *caveat emptor* found in sales of provisions for consumption, that they have entirely overlooked the more general exception and have held that a dealer of food has not the benefit of an implied warranty that goods sold by description shall be merchantable articles of that description.⁷⁴ In most cases, however, it has been held that, without regard to any peculiarities in the sale of provisions, there is an implied warranty that food sold by description to a dealer is merchantable as such.⁷⁵

⁷² WILLISTON ON SALES, §231.

⁷³ WILLISTON ON SALES, §§230 and 231.

⁷⁴ *Ryan v. Ulmer*, (1885) 108 Pa. 332. The court talks about a warranty of quality instead of a warranty of merchantability, but the buyer alleged a warranty of merchantability and the facts showed that the meat was "spoiled, so much so that it was not merchantable as human food". Merchantability is, of course, a quality but the use of the former term is to be preferred for exactness. This decision was reaffirmed in *Ryan v. Ulmer*, (1890) 137 Pa. 309. At times the courts have decided that there was no implied warranty, without disclosing whether the bargain related to specified goods or to goods identified by description only. See *Battaglia v. Thomas*, (1893) 5 Tex. Civ. App. 563. The probability is that these goods were specified by description only but the court says (p. 565): "where goods are sold by dealers to dealers, there is no implied warranty as to their quality arising out of the ultimate intention that the goods shall be consumed as food."

⁷⁵ *Bunch v. Weil*, (1904) 72 Ark. 343; *Thompson v. Crenshaw Grain Co.*, (1914) 113 Ark. 169; *Bailey v. Nichols*, (1796) 2 Root (Conn.) 407; *Murchie v. Cornell*, (1891) 155 Mass. 60; *Interstate Grocer Co. v. Geo. W. Bentley Co.*, (1913) 214 Mass. 227; *Sinclair v. Hathaway*, (1885) 57 Mich. 60; *Copas v. Provision Co.*, (1889) 73 Mich. 541; *Glasgow Milling Co. v. Burgher*, (1906) 122 Mo. App. 14; *Neil v. Cunningham Store Co.*, (1910) 149 Mo. App. 53; *Plumb v. J. W. Hallauer & Sons Co.*, (1911) 130 N. Y. S. 147; *Standard Milling Co. v. DePass*, (1913) 139 N. Y. S. 611; *Ashford v. Shrader*, (1914) 167 N. C. 45; *Best v. Flint*, (1886) 58 Vt. 543. In *Murchie v. Cornell*, Mr. Justice Holmes says: "If a very vague generic word is used, like 'ice,' which taken

The distinction between the general implied warranty of merchantability as applied to sales of food, and the implied warranty peculiar to the sale of food is nowhere better emphasized than in the case of *Piper Co. v. Oppenheimer*,⁷⁶ although the conclusion there reached may be questioned. In this transaction, which was between dealers, the court finds that there was an allegation of an implied warranty that the food was wholesome, but no allegation of an implied warranty that the goods were merchantable. The court does not question that an implied warranty of merchantability would be broken in a sale, to a dealer, of food which was unfit to eat; but says that the plaintiff cannot recover upon an implied warranty that the food was wholesome, because this particular exception to *caveat emptor* does not exist in a transaction between dealers; and he cannot recover upon an implied warranty that the goods were merchantable, because he did not allege such a warranty.

Another exception to *caveat emptor* may arise in a sale of food to a dealer, and it may be worked out in either of two ways. Where a manufacturer sells his product for a known purpose there is an implied warranty, that it is reasonably fit for such use, which will be broken if the product was food which is not fit for human consumption. Moreover,

"where the seller manufactured the goods which he sold, a warranty that the goods are merchantable is implied both in England and in this country, unless something in the terms of the bargain indicates a contrary intention, or unless the buyer had opportunity to inspect the goods and this inspection would have disclosed the defect."⁷⁷

Hence if the one who sells foods to a dealer is the manufacturer, he

literally may be satisfied by a worthless article, and the contract is a commercial contract, the court properly may instruct the jury that the word means more than its bare definition in the dictionary, and calls for a merchantable article of that name."

⁷⁶ (1913) 158 S. W. (Tex. Civ. App.) 777.

⁷⁷ WILLISTON ON SALES, §232.

⁷⁸ *Cook v. Darling*, (1910) 160 Mich. 475; *Wolverine Spice Co. v. Fallas*, (1914) 182 Mich. 361; *St. Louis Brewing Ass'n v. McEnroe*, (1899) 80 Mo. App. 429; *Pease v. Sabin*, (1866) 38 Vt. 432. In the last case the court said (p. 435): "The principle seems to be now well settled by the authorities, that when the manufacturer of an article sells it for a particular purpose, the purchaser making known to him at the time the purpose for which he buys it, the seller thereby warrants it fit and proper for such purpose, and free from latent defects." In *Pfoh v. Porter*, (1913) 23 Cal. App. 59, it was held that in an executory contract of sale of grapes, which the grower knew the buyer wished to sell for table use, there was an implied warranty that they should be fit for this purpose. *Niza v. Lehmann*, (1905) 70 Kan. 664, held that the manufac-

is liable on an implied warranty if it is unwholesome,⁷⁸ unless the buyer inspected the goods and the defect was obvious.

There is a dictum in one case⁷⁹ to the effect that if the manufacturer is liable to the dealer for breach of an implied warranty that food is fit for consumption,⁸⁰ the dealer cannot include, as an item of his damages, the loss of trade caused by his handling the unwholesome product. But reason points the other way. In action by an injured consumer it is clear⁸¹ that he can recover, if at all, for the personal injury resulting from eating the unwholesome food. If this is allowed in such instances it would seem to follow that the injured dealer, in a case where there is a breach of warranty, should be allowed to recover for the damage to his business. And so the cases hold.⁸²

A Colorado case⁸³ has held that in a sale, between dealers, in which the goods are specified by description only, "The general rule is, that there is no implied warranty of quality in the sale of perishable goods." This startling doctrine has not found acceptance elsewhere. In truth the better considered cases not only imply a warranty in such transactions, but go so far as to hold that if the sale contemplates a shipment to a dealer who intends to resell, the warranty enlarges to include that the goods are in such condition that they can be transported to the point desired and be fit for

turer of canned goods which were sold by sample impliedly warranted that they were not worthless because of a latent defect that could not be discovered by an ordinary examination of the sample. To the same effect under the Sales Act, see *Stewart v. Voll & Son*, (1911) 81 N. J. L. 323. See *Baer Grocer Co. v. Barber Milling Co.*, (1915) 223 Fed. 969, where it was held that the manufacturer of a fancy flour, which he knew the dealer was intending to sell under a particular brand, did not impliedly warrant that it would "please" the dealer's customers.

⁷⁸ *St. Louis Brewing Ass'n v. McEnroe*, (1899) 80 Mo. App. 429.

⁸⁰ To say that a seller is liable for a breach of an implied warranty that goods are merchantable, which warranty is broken in a particular instance because the goods, being food, are not fit to eat, and also to say that in this particular situation this seller does not warrant that the food is wholesome, is a quibble that arises several centuries too late for serious consideration.

⁸¹ In *Valeri v. Pullman Co.*, (1914) 218 Fed. 519, after suggesting that there was no implied warranty under the circumstances of the case, it was said that "if the food was unfit for consumption, the remedy would be an action to recover back the purchase money, if it had been paid", not for the personal injuries suffered. But all the cases cited in this article which have allowed a consumer to recover from a dealer from whom he purchased unwholesome food, have permitted a recovery for the personal injury sustained.

⁸² *Neiman v. Channellene Oil & Mfg. Co.*, (1910) 112 Minn. 11; *Swain v. Schieffelin*, (1892) 134 N. Y. 471; *Masetti v. Armour & Co.*, (1913) 75 Wash. 622.

⁸³ *J. D. Best Co. v. Brewer*, (1911) 50 Colo. 455, see in particular p. 462.

resale upon arrival there.⁸⁴ It is to be observed that this is not a promise that the goods will arrive in a saleable condition, but only a warranty that their condition at the time of the sale is such that it is possible for them to be transported in the normal course of business without rendering them unmerchantable upon arrival. If they were in such condition at that time, any loss due to delay or to improper handling in transit, or any other reason not caused by the seller, will fall, as between these parties, upon the buyer.

SALES BY A DEALER

Blackstone suggested⁸⁵ no limitation to the rule that "in contracts for provisions, it is always implied that they are wholesome". This sentence is quoted in the *Van Bracklin* dictum, which accepts it with the modification that it must be a "sale of provisions for domestic use." To this nothing is added by the majority of the early dicta.⁸⁶ Since a court, however, in conceding that a general rule has an exception not applicable to the case, would frequently not take the trouble to so extend its dictum as to mark out all the limitations of that exception, these statements are entitled to less weight than are those, fewer in number, which suggest that the warranty is implied only when the sale is by a "victualler"⁸⁷ or a "common vendor of articles of food".⁸⁸ This same distinction was suggested by Baron Parke in a later case.⁸⁹

But in *Divine v. McCormick*⁹⁰ the court, after finding that the article was sold for immediate consumption to one who did not buy to sell again, and in the absence of evidence that the seller was in

⁸⁴ *Truschel v. Dean*, (1906) 77 Ark. 546; *Southern Produce Co. v. Oteri*, (1910) 94 Ark. 318. See *Farren v. Dameron*, (1904) 99 Md. 323, in which it was held that there was no implied warranty that oysters which were merchantable at the time of delivery, were free from latent defects. As a matter of fact, however, there was evidence in the case from which it could be inferred that the oysters may have been infected by those purchased from another seller, and this fact is given weight by the court. See also *Beer v. Walker*, (1877) 46 L. J. C. P. 677.

⁸⁵ 3 BLK. COM. 165.

⁸⁶ *Moore v. McKinlay*, (1855) 5 Cal. 471, 473; *Jones v. Murray*, (1825) 3 T. B. Mon. (Ky.) 83, 85; *Marshall v. Peck*, (1833) 1 Dana (Ky.) 609, 613; *Osgood v. Lewis*, (1829) 2 Har. & G. (Md.) 495, 519; *Waring v. Mason*, (1837) 18 Wend. (N. Y.) 425, 439; *Müller v. Scherder*, (1849) 2 N. Y. 262, 267; *Hyland v. Sherman*, (1853) 2 E. D. Smith (N. Y.) 234, 238; *Hoe v. Sanborn*, (1860) 21 N. Y. 552, 560; *Getty v. Rountree*, (1850) 2 Pinney (Wis.) 379, 386; *Williams v. Slaughter*, (1854) 3 Wis. 347, 360.

⁸⁷ *Emerson v. Brigham*, (1813) 10 Mass. 197, 201.

⁸⁸ *Winsor v. Lombard*, (1836) 18 Pick. (Mass.) 57, 62.

⁸⁹ *Burnby v. Bollett*, (1847) 16 M. & W. 644, 655.

⁹⁰ (1867) 50 Barb. (N. Y.) 116.

any sense of the word a dealer, concludes that there was an implied warranty of wholesomeness. There was evidence, on the other hand, tending to show that the seller knew, or had reason to know of the diseased condition of the heifer at the time of the sale; and although the judge did not advert to this fact until after reaching the conclusion previously stated, the actual decision is only that such a seller is answerable for the unwholesome condition when he sold with such knowledge.⁹¹

"The doctrine seems to be that any purchase for domestic consumption is protected", is the statement of the court in *Hoover v. Peters*.⁹² Counsel had urged strongly that there was no warranty here because the seller was not a "common dealer". For the same reason Christiancy, J., dissented. Yet it seems that the facts of the case bring the seller within the rule of a sale by a dealer, leaving the decision sound and the statement as to "any sale", dictum only. The court says: "Where a person, as in this case, sells goods in open market", etc., and the seller's counsel indicate that it was part of a sale of a load of provisions in "open market". While the word "market" is losing much of its ancient significance, it is safe to infer that a transaction in 1869 which was referred to twice as a sale in open market, one of these statements mentioning that a "load of provisions" was thus sold, was not a "casual sale"⁹³ in the true sense of the term, but a sale of goods that had been exposed for sale in the market place. That such a sale is to be treated in the same manner as a sale by a dealer was the opinion of Baron Parke⁹⁴ as indicated by the following sentence: "This is not the case of a butcher, or taverner, or farmer killing or exposing to sale meat in open market, who may be reasonably taken as impliedly warranting the meat to be sound."

Whether or not we would commonly apply the word "dealer" to such a seller, it is clear that the rule may be so extended without embracing a strictly "casual sale." It should be mentioned also in this connection that the word "dealer" is used in an unusually broad sense as applied to the rule in question. For instance we usually distinguish between a dealer and a manufacturer, even if

⁹¹ In *Cotton v. Reed*, (1898) 54 N. Y. S. 143, 144, this important fact is overlooked and it is said of *Divine v. McCormick* that "it does not correctly state the rule of law, and is in effect overruled".

⁹² (1869) 18 Mich. 51, 55.

⁹³ Christiancy, J., applied this term to the transaction in his dissenting opinion.

⁹⁴ In *Burnby v. Bollett*, (1847) 16 M. & W. 644, 649.

the latter sells directly to the ultimate consumer. The same distinction is drawn between a dealer and a grower. But in the statement of this rule all such situations are included in the expression "sale by a dealer". Bearing in mind this use of the word, we may say that the implied warranty peculiar to the sale of food arises only in sales by a dealer.⁹⁵

There are instances, it is true, in which one who is in no sense of the word a "dealer" is answerable for the unwholesomeness of food sold by him, but it is to be noted that these situations involve the application of general rules to food cases, not the rule peculiar to the sale of provisions. Thus if such a seller knew that the food was unwholesome he would be liable if he sold it as food without disclosing this fact to a buyer who was ignorant thereof.⁹⁶ Such, in fact, was the actual decision in the *Van Bracklin* case. Nor is actual knowledge necessary in such a situation. If he knew facts, unknown to the buyer, which gave him "reason to believe" that the food was unwholesome, his responsibility would be the same.⁹⁷ Furthermore,

⁹⁵ *Giroux v. Stedman*, (1888) 145 Mass. 439. In this case the court should, perhaps, have found that the seller had reason to believe the food he sold was unsound; but as it expressly found that he did not the decision is squarely in point. The defendants were "farmers carrying on a farm in Chicopee, and jointly interested in raising pigs". But there is nothing to show that they were accustomed to sell them for consumption. Emphasis on the fact that the seller must be a dealer is found in many cases by way of dictum, and in fact, is included in every statement which purports to state the rule with exactness, see: *Cotton v. Reed*, (1898) 54 N. Y. S. 143, in which it is said, "The exception regarding articles sold for food is limited strictly to transactions between the dealer in foods and the customer trading with him in the ordinary course of business". *Zenkel v. Oneida County Creameries Co.*, (1918) 171 N. Y. S. 676; *Race v. Krum*, (1918) 222 N. Y. 410, saying on p. 414, "The general rule established by the weight of authority . . . is that accompanying all sales by a retail dealer", etc. *Flessner v. Garstens Packing Co.*, (1916) 93 Wash. 48. In *Wiedeman v. Keller*, (1898) 171 Ill. 93, the court says on p. 99, "nor would there be any liability, in a sale for immediate domestic use, where the vendor was not a regular dealer." This statement is quoted with approval in *Chapman v. Roggenkamp*, (1913) 182 Ill. App. 117, 121. See also WILLISTON ON SALES, §242.

⁹⁶ *Divine v. McCormick*, (1867) 50 Barb. (N. Y.) 116; *Burch v. Spencer*, (1878) 15 Hun (N. Y.) 504.

⁹⁷ In *Van Bracklin v. Fonda*, the "knowledge" of the seller was only that the cow had "eaten, shortly before she was killed, a very large quantity of peas and oats". In *Divine v. McCormick* the statement of the court is that it is an almost irresistible inference from the facts that the "defendant was aware of, or had great reason to suspect, the unsound and unwholesome condition", etc. In *Giroux v. Stedman*, (1888) 145 Mass. 439, the seller was held not liable although he knew that his herd of hogs had been exposed to the cholera, but the court lays emphasis on the fact that not only did he not know that this hog was affected but also there was evidence that "even if affected, the meat was not necessarily unwholesome." For this reason they distinguished the case (incorrectly it is suggested) from *French v. Vining*, (1869)

since this has nothing to do with the rule peculiar to the sale of food, the result would be the same whether the sale was to a buyer for immediate consumption or to a dealer.⁹⁸

Another instance in which it is not important whether the seller is a dealer or not is that "upon the sale of goods, by name or description, in the absence of some other controlling stipulation in the contract, a condition⁹⁹ is implied that the goods shall be merchantable under that name. They must be goods known in the market and among those familiar with that kind of trade by that description, and of such quality as to have value." Hence in this kind of transaction "upon a sale even by a casual owner of sardines, he is bound to deliver something which answers that description in the trade" and is saleable as such.¹⁰⁰

SALE FOR IMMEDIATE USE

An expression which frequently finds a place in the statement of this rule is that the warranty is implied only where the sale is "for immediate use",¹⁰¹ or "for immediate consumption."¹⁰² In *Kinch v. Haynes*¹⁰³ it was suggested *obiter* that the warranty arises only when the sale is "direct to the consumer for immediate consumption." This invites inquiry as to how soon it must be contemplated that the food is to be eaten. It is submitted that this notion has not the slightest bearing upon the existence of the warranty. "Immediate" is contrasted to "mediate", in its proper use in this rule,

102 Mass. 132, in which the defendant was held liable for the death of a cow caused by eating hay, poisoned by white lead. The seller knew that white lead had been spilt upon the pile of hay and had tried to separate the affected part, but sold without disclosing this fact to the buyer.

⁹⁸ *Burch v. Spencer*, (1878) 15 Hun (N. Y.) 504.

⁹⁹ The editors of BENNETT'S BENJAMIN ON SALES (7th ed., p. 644, note (5)) called this a "condition" and this term is used in the Sale of Goods Act. But Williston (WILLISTON ON SALES, §§179 and 180) shows that it is not a "condition" but a "promise", being the equivalent of the old term "dependent covenant".

¹⁰⁰ *Interstate Grocer Co. v. Geo. W. Bentley Co.*, (1913) 214 Mass. 227, 231.

¹⁰¹ See for example: *Wiedeman v. Keller*, (1898) 171 Ill. 93, 98; *Chapman v. Roggenkamp*, (1913) 182 Ill. App. 117, 121; *Race v. Krum*, (1918) 222 N. Y. 410, 414; *Muller v. Childs Co.*, (1918) 171 N. Y. S. 541; *Zenkel v. Oneida County Creameries Co.*, (1918) 171 N. Y. S. 676.

¹⁰² See for example: *Parks v. Pie Co.*, (1914) 93 Kan. 334, 337; *Moses v. Mead*, (1845) 1 Denio (N. Y.) 378, 388; *Müller v. Scherder*, (1849) 2 N. Y. 262, 267; *Kinch v. Haynes*, (1908) 58 Misc. Rep. (N. Y.) 499, 501.

¹⁰³ *Supra*. In *Müller v. Scherder*, (1849) 2 N. Y. 262, 267, the statement is, "For, although the law will imply a warranty of provisions sold for domestic use, and immediate consumption", etc. In *Wiedeman v. Keller*, *supra*, quoted in *Chapman v. Roggenkamp*, *supra*, the statement is "for immediate domestic use".

not to designate time, but to indicate the manner in which the result is reached. With rare exceptions all food is sold for consumption. But in some instances this is done indirectly through the medium of a dealer, while in others the sale is for "immediate consumption".

The use of such language in connection with this rule seems to have originated with Bronson, C. J., in *Moses v. Mead*.¹⁰⁴ He says:

"But there is a very plain distinction between selling provisions 'for domestic use,' and selling them as articles of merchandize, which the buyer does not intend to consume, but to sell again. . . . When provisions are not sold for immediate consumption, there is no more reason for implying a warranty of soundness, than there is in relation to sales of other articles of merchandize."

It is obvious that "not for immediate consumption" as so employed is to describe a sale to a dealer as distinguished from a sale "for domestic use". The language in this case is quoted in *Divine v. McCormick*¹⁰⁵ by Hogeboom, J., who then concludes: "Assuming . . . that to render the vendor liable on an implied warranty in the sale of provisions they must be sold for domestic use, or immediate consumption, I am nevertheless of the opinion that this judgment should be affirmed." As it is obvious that he does not intend to designate two distinct situations by the expression "for domestic use or immediate consumption", it follows that he is using them interchangeably. It is true that the court emphasizes in this case the fact that it was contemplated by the parties that the buyer would kill the heifer the "next day", but as the finding is that he did not buy to sell again, it is a necessary inference that the transaction was for the purpose of supplying him with meat for some time to come.

The problem may be tested in this way. Suppose that a buyer was injured by food purchased by him, from a dealer, within the hour in which it was eaten. The dealer concedes that he would be liable except for the fact that the buyer had stated at the time of the purchase that he did not intend to use the food for some months; but claims that for this reason no warranty of wholesomeness was implied. Even if we imagine the rare instance in which the deleterious effect of the food would have disappeared, instead of increased, within the time mentioned by the buyer, it is suggested that the seller would be liable unless he had warned the purchaser of the

¹⁰⁴ (1845) 1 Denio (N. Y.) 378, 388.

¹⁰⁵ (1867) 50 Barb. (N. Y.) 116, 118.

danger of immediate consumption, or the circumstances were such that he should have known of it.

To be sure, there is no rule peculiar to the sale of food which would impose upon the dealer an implied promise that food sold will remain wholesome for any considerable period of time. The thought is merely that the existence of the warranty that it is wholesome at the time of the sale does not depend upon when the buyer intends to eat it. The holding would doubtless be that if the food was so nearly spoiled that, while it might have been eaten without resulting injury in the shop, yet it could not have been taken elsewhere without becoming unwholesome, the warranty would be broken unless the sale contemplated that the food should be there consumed. In other words the warranty is that the condition of the food at the time of the sale is such that it can be prepared and eaten within a reasonable time without producing injurious results. If any considerable length of time elapsed between the sale and the consumption, the inquiry would be, not whether a warranty was implied in the sale, but whether it was broken. That is, whether the injury resulted from the condition of the food at the time of the sale, or from subsequent changes therein caused by undue lapse of time or by improper care.

FOR HUMAN CONSUMPTION

The use of the word "food" suggests articles intended for man, and when the term "provisions" is used interchangeably therewith this conclusion is strengthened. Some courts have been even more precise, using such expressions as "food for mankind",¹⁰⁶ "human food",¹⁰⁷ or "wholesome for human consumption".¹⁰⁸ But in spite of these indications there are suggestions in some of the cases that the rule includes feed for stock,¹⁰⁹ and twice this has been

¹⁰⁶ *Hart v. Wright*, (1837) 17 Wend. (N. Y.) 267, 272; *Moses v. Mead*, (1846) 5 Denio (N. Y.) 617, 618.

¹⁰⁷ *Parks v. Pie Co.*, (1914) 93 Kan. 334, 337.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Walden v. Wheeler*, (1913) 153 Ky. 181. The actual decision in this case was that there was no implied warranty of wholesomeness; but the court fails to distinguish between human food and stock feed, resting the decision upon the ground that where, as in this case, the dealer resells the article in the original sealed package, the usual rule does not apply, following the decisions in certain cases in regard to canned goods. See also *Newell v. Reid*, (1915) 155 N. W. (Mich.) 352, in which the only point discussed is whether the evidence supports the finding that the cows were killed by eating bran sold by the defendant and impregnated with arsenic. It is assumed that the dealer is liable if this finding is sound, but whether this is based upon an implied war-

held by the Court of Civil Appeals of Texas.¹¹⁰ Neither of these decisions, however, is satisfactory. In *Houston Cotton Oil Co. v. Trammell*, the court says: "The law will also imply a warranty that feed sold for consumption is wholesome and fit for that purpose, and this doctrine is correctly held to apply to the sale of food for domestic animals. Cooley on Torts, 562." But this "holding" by Mr. Cooley was based upon *French v. Vining*,¹¹¹ which held nothing of the sort. In that case Ames, J., emphasizes the fact that the seller knew that poison had been spilt upon the hay, which was the article sold, having previously stated that "The *scienter* is not only a material, but a vital part of the case." In *Houk v. Berg*, decided four years later, the court without mentioning the decision in the *Cotton Oil Co.* case, relies upon *French v. Vining*, overlooking entirely the above mentioned fact.

The most carefully considered case on this point is *Lukens v. Freund*,¹¹² in which Mr. Justice Brewer, later a Justice of the Supreme Court of the United States, shows that since the exception to *caveat emptor* arising in sales of food by a dealer to a consumer is based upon a "regard for human life", it has no application to sales of stock feed. This decision seems preferable to the Texas rule and has been followed where the point has arisen elsewhere,¹¹³ upon the same reasoning.¹¹⁴

As the rule peculiar to the sales of food is not involved, and the problems have been discussed sufficiently in other connections, it is not necessary to take up sales of stock feed where the seller knew or had reason to believe that the article sold was unwholesome but did not disclose the fact,¹¹⁵ nor where the sale is by description.¹¹⁶

ranty is not stated and there are indications of negligence. See also the dictum in *Rothmiller v. Stein*, (1894) 143 N. Y. S. 581.

¹¹⁰ *Houston Cotton Oil Co. v. Trammell*, (1903) 72 S. W. 244; *Houk v. Berg*, (1907) 105 S. W. 1176.

¹¹¹ (1869) 102 Mass. 132.

¹¹² (1882) 27 Kan. 664.

¹¹³ *National Cotton Oil Co. v. Young*, (1905) 74 Ark. 144; *Dulaney v. Jones & Rogers*, (1911) 100 Miss. 835.

¹¹⁴ See p. 148 of the Arkansas Report and p. 840 of the other.

¹¹⁵ *French v. Vining*, (1869) 102 Mass. 132; *Provost v. Cook*, (1903) 184 Mass. 315. In the second case the buyer's horses were killed by eating oats impregnated with paris green. There had been a fire in the building in which the oats were kept and in the process of extinguishing it the oats had become wet. The buyer knew this fact and purchased them cheaply as damaged oats, but he did not know, what was known to the seller, that paris green, kept in open packages in the same room, might easily have come in contact with the oats during the process of putting out the fire or the confusion that followed. The seller was held liable.

¹¹⁶ See *Coyle & Smith v. Baum*, (1895) 3 Okl. 695; *Wright v. Howe*, (1915) 150 Pac. (Utah) 956

The problem of "human consumption" involves little dispute except as to the matter of stock feed. It is obvious that the rule must apply, not only to the main article of food, or its chief ingredients, but also to such incidentals as cooking oil, and it has been so held.¹¹⁷ There are two interesting cases dealing with chewing tobacco¹¹⁸ which agree that this article is not food, but are in conflict as to the liability of the manufacturer.¹¹⁹

It has been intimated that water supplied by a water company does not come within the rule, although in the case¹²⁰ it was "not necessary to consider that theory [implied warranty] because of the manner in which the case was tried and submitted."

CANNED GOODS

It was stated *obiter* in a recent case¹²¹ that "there is a well-defined line of cases that holds that retail dealers in selling canned goods for immediate use are not liable unless they can be charged with negligence in the purchase of such food, or with knowledge that the contents were unfit for human consumption." Investigation of the "well-defined line of cases" cited in support of this dictum, discloses that the first one relied upon, *Tomlinson v. Armour & Co.*,¹²² merely has the dictum: "Assuming (without deciding) that there is no implied warranty on the part of the manufacturer of canned food that the goods shall be wholesome and fit to be eaten", etc.; and *Mazetti v. Armour and Co.*,¹²³ the last case cited, while deciding the contrary of what was admitted without being decided in the other, merely quotes *obiter* from the *Bigelow*

¹¹⁷ *Meshbesh v. Channellene Oil & Mfg. Co.*, (1909) 107 Minn. 104.

¹¹⁸ *Pillars v. Reynolds Tobacco Co.*, (1918) 78 So. (Miss.) 365; *Liggett & Myers Tobacco Co. v. Cannon*, (1915) 178 S. W. (Tenn.) 1009.

¹¹⁹ The *Cannon* case held the manufacturer was not liable, the court seeming to be influenced by a prejudice against the use of tobacco in this form. The *Pillars* case, in which both the manufacturer and the distributor were sued, held that while the latter was not liable, the former was because the regard for human life demands that a foreign poison should not be included in a substance even though it was intended to be taken into the mouth only.

¹²⁰ *Green v. Ashland Water Co.*, (1898) 101 Wis. 258. In *Buchingham v. Water Co.*, (1891) 142 Pa. 221, the plaintiff was non-suited because there was no evidence of negligence; but his action was trespass. In the *Green* case it is also important that the court decides, notwithstanding a finding by the jury to the contrary, that the man knew the water was dangerous when he used it. Clearly there would be no implied warranty that it was not dangerous in favor of one who knew the contrary.

¹²¹ *Walters v. United Grocery Co.*, (1918) 172 Pac. (Utah) 473, 474.

¹²² (1908) 75 N. J. L. 748, see p. 755.

¹²³ (1913) 75 Wash. 622.

case,¹²⁴ leaving *Julian v. Laubenberg*,¹²⁵ the only other case cited, and the *Bigelow* case thus referred to, as the only decisions in point.

Since two-thirds of the cases named by the court in support of its bold dictum contain dicta only, we may wonder why it neglected to mention the like dicta in *Trafton v. Davis*¹²⁶ and in *Cotton v. Reed*.¹²⁷ Moreover, since this leaves but two decisions to constitute the "well-defined line of cases", *Walden v. Wheeler*¹²⁸ might well have been included, although its support would not be great. The sale there involved was of stock feed, and while the fact that the dealer resold in the original sealed package is emphasized, the same result would have been reached by a sound application of the rule as to stock feed.

Julian v. Laubenberg is a decision squarely in point by the Supreme Court of New York. This conclusion was reached, however, by completely overlooking the important distinction between the English theory underlying this rule, and our own, and by applying the former. It is true that if our notion were, as is the English, that the warranty is based on the buyer's reliance on the skill and judgment of the seller, there would be some ground to argue that he could reasonably rely, in the case of canned goods, upon the dealer's selection of a reliable brand and no more. But since our theory is based upon the "regard for human life" and not upon the "reliance of the buyer" the reasoning of the court is unsound, whatever may be our conclusion as to the result reached.

The *Bigelow* case, in deciding that a carrier is not an insurer of the wholesomeness of canned goods served on a diner, also relies upon the notion that the "reliance of the buyer" cannot apply to more than the selection of a reputable brand of canned goods, without observing that this is not at all the theory upon which the American rule is grounded. Reliance is also placed upon the case

¹²⁴ *Bigelow v. Maine Cent. R. Co.*, (1912) 85 Atl. (Me.) 396, quoted on pages 628 and 629 of the Washington Report.

¹²⁵ (1896) 38 N. Y. S. 1052.

¹²⁶ (1913) 110 Me. 318, 325.

¹²⁷ (1898) 54 N. Y. S. 143, 144. The statement here does not mention canned goods by name, but clearly would include them. It is: "So strictly is the rule applied that, when the article sold is of such a nature that neither the dealer nor his customer could have determined its condition before its preparation for actual use, then the exception does not prevail, and the rule of *caveat emptor* must regulate the rights of the parties."

¹²⁸ (1913) 153 Ky. 181.

of *Winsor v. Lombard*¹²⁹ without realizing that the deciding factor there is that the sale was from one dealer to another.

Leaving out of mind for the moment that these cases are not well considered, we are still faced by the fact that after adding one to the list mentioned we have only three decisions to support the dictum. One of these involved a sale of stock feed¹³⁰ and should have been decided upon that ground; one of them involved the serving of food on a diner,¹³¹ which fact may have had some influence on the court whether it should have done so or not; and the remaining one was decided by a court not of last resort.¹³²

But however "clear" this line of cases may appear to the Utah court, there is authority the other way. In *Chapman v. Roggenkamp*¹³³ a consumer was injured by canned goods sold to him by a dealer who was not the manufacturer. The defendant sought to distinguish the case from *Wiedeman v. Keller*¹³⁴ but the court rejected the argument that the cases were distinguishable on this ground, pointing out that that case emphasized the fact that the rule is based upon public safety and not on opportunity for inspection. This decision was followed in the *Sloan* case¹³⁵ two years later. The most recent decision upon this point is a Massachusetts case¹³⁶ which emphasizes the fact that the rule of implied warranty in the sale of food by a dealer to a consumer is well established and should not be altered by exceptions which are not founded upon good reason, adding that no such reason exists for taking instances of canned goods out of the rule. It says:¹³⁷

"There appears to us no sound reason for ingrafting an exception on the general rule, because the subject of the sale is canned goods, not open to the immediate inspection of the dealer, . . . It doubtless still remains true that the dealer is in a better position to know and ascertain the reliability and

¹²⁹ (1836) 18 Pick. (Mass.) 57.

¹³⁰ *Walden v. Wheeler*, *supra*.

¹³¹ *Bigelow v. Maine Cent. R. Co.*, *supra*.

¹³² *The Julian* case, *supra*, by the Supreme Court of New York.

¹³³ (1913) 182 Ill. App. 117. This like the *Sloan* case, is also not by a court of last resort but it is important to note that while the judges were not the same, this court is the same one (Appellate Court for the First District) which was reversed by the Supreme Court in *Wiedeman v. Keller* where that court emphasized the distinction between the English rule and our own.

¹³⁴ (1898) 171 Ill. 93.

¹³⁵ *Sloan v. F. W. Woolworth Co.*, (1915) 193 Ill. App. 620.

¹³⁶ *Ward v. Great Atlantic & Pacific Tea Co.*, (Sept. 11, 1918) 120 N. E. 225. This was a case under the Sales Act, but of this the court says: "In this respect the statute is in substance, so far as concerns a dealer such as the defendant, simply a codification of the common law."

¹³⁷ *Ibid.*, p. 226.

responsibility of the manufacturer than is the retail purchaser. But the principle . . . is a general one. It has been long established. . . . It places responsibility upon the party to the contract best able to protect himself against original wrong of this kind, and to recoup himself in case of loss, because he knows or comes in touch with the manufacturer. In the case at bar the plaintiff had no means of ascertaining the manufacturer . . . and would have been at a disadvantage if his only remedy were against him."

Before concluding the discussion of this problem, since it has been shown that the cases holding that sales of canned goods form an exception to the rule, have reached this result by erroneously applying the English rule instead of our own, it may be well to invite attention to the fact that the English courts, in their own application of that rule, have held that the retail dealer impliedly warrants the wholesomeness of canned goods. For instance in *Jackson v. Watson & Sons*,¹³⁸ it is said:

"The plaintiff sues for breach of contract of warranty of fitness for human food of certain tinned salmon supplied to and eaten by himself and his wife, and there is not (and indeed since *Frost v. Aylesbury Dairy Co.* [(1905) 1 K. B. 608] there could not well be) any question as to the sufficiency of his cause of action: the only question is as to the damages."

Even as early as 1862 Cockburn, C. J., had said:¹³⁹ "Where a person undertakes to supply provisions, and they are supplied in cases hermetically sealed, but turn out to be putrid, it is no answer to say that he has been deceived by the person from whom he got them."

Thus the notion that in the purchase of canned goods the buyer places no reliance on the skill and judgment of the seller is at least questionable. But the American theory, which emphasizes less the pecuniary considerations of the individual buyer or seller than the health and safety of the public¹⁴⁰ does not impose the implied warranty primarily for the purpose of giving a recovery to the injured individual, but to prevent the injury. It recognizes that this is to some extent an "onerous burden", but also that under sufficient stimulus a person can exert far greater precaution than is demanded by the rule of "due care". This warranty is to provide such stimulus in order that the lives and health of the public may have the greatest possible protection from unwholesome food. While there may be less opportunity for the dealer to know of

¹³⁸ (1909) 2 K. B. 193, 202.

¹³⁹ *Bigge v. Parkinson*, 7 H. & N. 955, 958. (Dictum.)

¹⁴⁰ See for example the statement in *Hoover v. Peters*, (1869) 18 Mich. 51, 55.

defects in canned goods than in goods open to inspection, the purchase, handling and selling of such articles does not present a field in which "care" is entirely unimportant, as evidenced by the admission that the dealer should be liable if he can be "charged with negligence in the purchase of such food, or with knowledge that the contents were unfit for human consumption."¹⁴¹ This being true no sound reason exists why the law should withdraw the stimulus from such situations; and as we have seen the more recent cases do not do so.

SELECTION BY THE BUYER

It is an interesting fact that the Massachusetts court, which refused to follow the error caused by applying the English theory instead of our own, in the case of canned goods, had itself previously made that same mistake on the question of "selection by the buyer". In *Farrell v. Manhattan Market Co.*¹⁴² the plaintiff alleged that she purchased a slaughtered fowl from defendant's market with the implied warranty that it was wholesome for food, etc., but that she was injured because of its tainted condition. No proof having been offered by her at the trial that she left the selection to the dealer, a directed verdict for the defendant was held to be correct. The court, after an extensive research into the English cases followed by a very brief survey of our own, failed to note any distinction between them and applied the theory of the former, reaching the result that the dealer is not liable unless his skill and judgment were relied on by leaving the actual selection to him; or he sold knowing that the food was unwholesome. To show how very far the court was led astray in this case we need mention only that it asserted that no amount of negligence on the part of a dealer will render him liable, if he did not actually believe the food was tainted. The startling statement¹⁴³ is that

"if the selection is left to the dealer, due care by him is no defense. He is liable for latent unsoundness that could not be discovered. . . . As due care is no defense when the dealer makes the selection, so there is no liability for negligence when a dealer offers several articles of food for sale from which the buyer is to make his own selection. In offering these several articles, he impliedly represents that he believes all of them to be fit for food. That is the extent of his liability; no question of negligence is involved."

¹⁴¹ *Walters v. United Grocery Co.*, (1918) 172 Pac. (Utah) 473, 474.

¹⁴² (1908) 198 Mass. 271. The doctrine here declared was repeated *obiter* in *Gearing v. Berkson*, (1916) 223 Mass. 257, 259.

¹⁴³ *Ibid.*, p. 286.

Two children of the buyer had been injured by the same food and had brought actions of tort, but after announcing this untenable doctrine it was not necessary to consider them.

If the court had given as careful consideration to our own cases as it did to the English decisions, it would have noted that as early as 1837 it was stated that the implied warranty¹⁴⁴

“must prevail in all cases in the sale of provisions; the party having an opportunity to examine the article, does not exempt the vendor from liability, unless the defect in the article be so palpable that the most unskilful and inexperienced, can from examination or from inspection, easily detect it, or the purchaser at the time be informed of the defect, or the vendor informed that the article is wanted for other purposes than for food for man.”

As selection by the buyer is not one of the excepted situations, it would fall under “all cases”, in which the rule applies.

A consideration of our own cases would have disclosed the further interesting fact that here the question had been decided the other way. In *Wiedeman v. Keller*,¹⁴⁵ it had been held by an Appellate Court of Illinois that the implied warranty of wholesomeness did not arise where the seller was reasonably unaware of the defects and it appeared “that the vendee selected the pork from a larger piece, off which, by her dictation, what she purchased was cut.”¹⁴⁶ This was reversed by the Supreme Court¹⁴⁷ which said:

“But the law on the subject as established in England does not prevail here. As a general rule, we think the decided weight of authority in the United States is, that in all sales of meats or provisions for immediate domestic use by a retail dealer there is an implied warranty of fitness and wholesomeness for consumption.”

Even if the rule depended upon the reliance of the buyer upon the skill and judgment of the seller, it may be questioned whether the buyer's selection should disturb the rule of implied warranty, because it could be argued, with good reason, that the buyer relies upon the skill and judgment of the seller to exclude all poisonous or deleterious foods from his shelves, making his own selection to gain some advantage, not of wholesomeness, but of size, weight or appearance. But where the rule, as in our own country, is based

¹⁴⁴ *Wright v. Hart*, 18 Wend. (N. Y.) 449, 456.

¹⁴⁵ (1895) 58 Ill. App. 382.

¹⁴⁶ *Ibid.*, p. 384.

¹⁴⁷ *Wiedeman v. Keller*, (1898) 171 Ill. 93.

upon a "high regard for human life", the question of who makes the selection can have no possible bearing upon the existence of the warranty.

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(To be concluded.)

IOWA APPLICATIONS OF THE LAST CLEAR CHANCE DOCTRINE

The ever increasing number of cases dealing with that aspect of contributory negligence known as the Last Clear Chance doctrine seems to indicate either something inherently difficult or unworkable in the doctrine itself, or a lack of proper understanding of its application by courts and counsel. The English decision in *Davies v. Mann*,¹ the famous donkey case in which the rule is supposed to have had its inception, was decided as recently as 1842, yet in Iowa alone there have already been more than fifty decisions of the Supreme Court in which the rule of the Last Clear Chance, or Last Fair Chance, as it is sometimes called, has been dealt with.

A careful examination of the Iowa cases from 1870,² where what has since become known as the doctrine of the Last Clear Chance was first recognized, to 1919,³ shows, on the whole, a pretty clear and consistent doctrine enunciated and adhered to by the court. The rule has been applied in the narrow field where it should be, namely, in cases where negligence of both the defendant and the plaintiff has been shown, and the question is whether, by reason of the rule, the plaintiff may recover despite his own negligence. The court has realized that the sole function of the doctrine of the Last Clear Chance is to relieve the plaintiff from the effect of the general unqualified rule of contributory negligence where his own negligence is antecedent to that of the defendant.⁴ Difficulties must be ascribed to confusion in other jurisdictions, misstatements by text writers,⁵ or failure to see what has actually been decided. There are places where it might well be argued, as an original ques-

¹ 10 M. & W. 545.

² *Spencer v. Ill. Cent. Ry. Co.*, 29 Iowa 55, 58.

³ *Carr v. Interurban Ry. Co.*, 171 N. W. 167; *Arnold v. Ft. Dodge, etc., R. Co.*, 173 N. W. 252.

⁴ 36 L. R. A. (N. S.) 958 note.

⁵ For instance in SHEARMAN & REDFIELD ON NEGLIGENCE, 6th ed., §99, in citing Iowa cases following the principle of *Davies v. Mann*, are given three Iowa decisions (*Balcom v. Dubuque etc. Ry. Co.*, 21 Iowa 102; *Searles v. M. & St. P. Ry. Co.*, 35 Iowa 490; and *Kuhn v. C. R. I. & P. Ry. Co.*, 42 Iowa 420) in which the plaintiff was in no way guilty of negligence and the only question was the negligence of defendant, and where the rule of the Last Clear Chance was not involved in any way whatever.

tion, that the law should be different from that pronounced by the decisions, but comparatively few cases where the court has slipped from the ground taken in prior opinions.

The doctrine of Last Clear Chance was adopted by the Iowa court without discussion of the principle upon which it was founded, and without calling it by that name. It was first applied in approving an instruction given by the trial court in *Cooper v. Central Ry. of Iowa*,⁶ which was taken from an early edition of SHEARMAN & REDFIELD ON NEGLIGENCE and had been cited with approval (though not necessary to the decision) in an earlier case.⁷ Later when the rule had been denominated by the term "Last Clear Chance" it was more fully discussed and more fully stated.⁸

In his dissenting opinion in one of the leading cases on the subject in this state,⁹ Ladd, J., explains the rule on the reason generally accepted here, and indeed largely in decisions elsewhere. It does, he says, not constitute an exception to the doctrine of contributory negligence, "but merely operates to relieve the negligence of plaintiff, which would otherwise be regarded as contributory, from its character as such". The negligence of the defendant is to be called the sole proximate cause of the injury, that of the

⁶ 44 Iowa 134.

⁷ *Spencer v. Ill. Cent. Ry. Co.*, 29 Iowa 55, 58. The language is worth noting because it was the basis on which many cases were decided up to the time a fuller discussion was made by the court. "One who is injured by the mere negligence of another cannot recover any compensation for his injury, if he by his own ordinary negligence . . . contributed to produce the injury of which he complains . . . except when the direct cause of the injury is the omission of the other party after becoming aware of the injured party's negligence, to use a proper degree of care to avoid the consequences of such negligence".

⁸ An admirable statement of the situation involving the Last Clear Chance rule is made by McClain, C. J., in *Dale v. Colfax, etc. Coal Co.*, 131 Iowa 67, 70, 93 N. W. 68: "The question presented . . . was simply this: Whether after plaintiff had even by reason of his own negligence been placed in a position of danger, and his danger was known to the employes of defendant in charge of train, these employes used reasonable care in attempting to prevent injury resulting to him in his dangerous position. If the employes under such circumstances did fail to use reasonable care to avoid injury to the plaintiff, then the previous negligence of the plaintiff in bringing about the dangerous situation, would not be the proximate cause of the injury which he received, but he might recover for the consequences of the negligence of the defendant if in the exercise of reasonable care, under the circumstances, and with knowledge of his danger, such injuries could have been averted."

⁹ *Bourrett v. C. & N. W. Ry. Co.*, 152 Iowa 579, 132 N. W. 973.

plaintiff an antecedent or remote cause. This explanation of Last Clear Chance as merely an application of the rule of proximate cause is made in other Iowa cases.¹⁰

Such an explanation preserves the theory of contributory negligence unimpaired, but does it at the expense of rules governing causation, a difficult enough topic at best.¹¹ Whether the negligence of each of the parties in one of these Last Clear Chance cases is a proximate cause of the injury might well be tested by asking whether if a stranger had been hurt in the accident he could recover. Suppose in the famous case of *Davies v. Mann*, where the plaintiff's donkey with its feet fettered was negligently run into by defendant, that a third person had been injured by the collision. As is said by Mr. Justice Carpenter:¹² "All will agree that the owner of the donkey, as well as the owner of the cart, would have been liable." Then the negligence of each party must be a proximate contributing cause, unless as has been suggested,¹³ a different rule as to causation is applied when a stranger is injured, than governs between two parties who are negligent. I believe it would conduce to clear thinking and avoidance of misunderstanding if the Last Clear Chance Doctrine is frankly admitted to be an exception to the rule of contributory negligence; not "an arbitrary exception to a harsh rule",¹⁴ but an exception based as much on sound policy and justice as the rule itself.¹⁵

Iowa applications of the Last Clear Chance rule can perhaps best be shown by putting the different situations where the doctrine

¹⁰ *Orr v. C. R. & M. C. Ry. Co.*, 94 Iowa 423, 62 N. W. 851; *Sutts v. C. M. & St. P. Ry. Co.*, 95 Iowa 304, 63 N. W. 709; *Doherty v. Des Moines Ry. Co.*, 137 Iowa 358, 114 N. W. 183; *McCormick v. Ottumwa R. & L. Co.*, 146 Iowa 119, 124 N. W. 889; *Clemens v. C. R. I. & P. Ry. Co.*, 163 Iowa 499, 144 N. W. 354; *Carrigan v. M. & St. L. Ry. Co.*, 171 Iowa 723, 151 N. W. 1091.

¹¹ The same explanation has been made of the whole doctrine of contributory negligence. As has been said such explanation "is merely to state in terms of apparent causation the limits of legal liability". See F. H. Bohlen, 21 Harv. Law Rev. 233, 241.

¹² In *Nieboer v. Detroit Elec. Ry.*, 128 Mich. 486, 491, 87 N. W. 626.

¹³ POLLOCK ON TORTS, 10th ed., 485.

¹⁴ As it is called in 26 Harv. Law Rev. 369, 370.

¹⁵ See "*Davies v. Mann*, Theory of Contributory Negligence", William Schofield, 3 Harv. Law Rev. 263. Some of the situations in which recovery has been predicated upon the Last Clear Chance doctrine in Iowa are difficult to explain under any application of the rule of proximate cause. See this pointed out in the well-stated dissent by Evans, C. J., in *Bruggeman v. Ill. Cent. Ry. Co.*, 147 Iowa 187, 208, 123 N. W. 1007.

is or might be involved as hypothetical cases, and setting out the decisions under each case. It is not claimed that these cases will cover all possible combinations of facts where the rule may be applied. In all the Iowa cases cited, plaintiff's contributory negligence was not necessarily established; in many there was some evidence on the point, and the application of the Last Clear Chance rule was tested by the correctness of the instructions given the jury, based on the supposition of a finding by that body that the plaintiff had been guilty of negligent conduct.

Case 1. Plaintiff, a trespasser, negligently goes to sleep on the track on defendant railroad's right of way, and is run over by a train. Had the defendant's employees been on the lookout, they would have discovered plaintiff and could, in the exercise of due care, have stopped the train in time to avoid the injury to him.

The plaintiff is obviously helpless and in a position of peril, yet it is clear that there should be no recovery. Plaintiff being a trespasser, the defendant is under no obligation to use care to discover his presence. Without knowledge that he is there, they owe him no duty. The case is not one for application of Last Clear Chance at all, nor need contributory negligence be discussed. Defendant is not liable because guilty of no wrong. The result here is settled by an early Iowa decision.¹⁶

Case 2. Plaintiff negligently stalls his automobile on defendant railroad's tracks at a crossing where he cannot escape from a collision with defendant's oncoming train. Defendant's employees see the plaintiff's position and could have avoided the injury by due care after the discovery, but negligently fail to do so, and plaintiff suffers injury.

The plaintiff's position is one of helpless peril. It would be the same if he were asleep, caught without means of escape on a long trestle, lying under a train of cars, or any one of the infinite variety of such situations presented by the cases in Iowa and elsewhere. He cannot avert the injury by due care now, the defendant can. This is the easiest case for the application of the Last Clear Chance doctrine.

¹⁶ *O'Keefe v. C. R. I. & P. R. Co.*, 32 Iowa 467. The court in this case did deny recovery on grounds of contributory negligence. Accord, *Purcell v. C. & N. W. Ry. Co.*, 117 Iowa 667, 91 N. W. 933. See 31 L. R. A. (N. S.) 1032 note and authorities cited.

In some jurisdictions a recovery would be allowed on a different theory, namely, that such a defendant was guilty of wanton and reckless misconduct,¹⁷ though in others, with what seems a much more accurate use of language, to hold defendant on the latter theory, he must have been guilty of something more than mere lack of due care; there must be present in his mind a knowledge of danger with indifference to consequences.¹⁸

Iowa cases have throughout allowed a recovery in cases like the one supposed in a great variety of situations.¹⁹

¹⁷ *Alger etc. Co. v. Duluth-Superior Traction Co.*, 93 Minn. 314, 101 N. W. 298.

¹⁸ *Birmingham etc. Co. v. Bowers*, 110 Ala. 328, 20 So. 345; *A. T. & S. F. Ry. Co. v. Baker*, 79 Kan. 183, 98 Pac. 804; *Banks v. Braman*, 188 Mass. 367, 74 N. E. 594.

¹⁹ *O'Rowke v. C. B. & Q. Ry. Co.*, 44 Iowa 526 (negligent disposal by defendant of goods wrongly directed by plaintiff); *Cooper v. Central Ry. of Iowa*, 44 Iowa 134; *Morris v. C. B. & Q. Ry. Co.*, 45 Iowa 29 (an often cited case. Plaintiff was in a dangerous position on top of freight car and did not know of approaching train, though his presence was known to employees of defendant. Quare, was he in helpless position). *Lang v. Holiday Creek etc. R. Co.*, 49 Iowa 469 (adverse to plaintiff on facts); *Weymire v. Wolfe*, 52 Iowa 533, 3 N. W. 541 (defendant saloon keeper negligently subjects drunken customer to exposure in bad weather); *McKean v. B. C. R. & N. Ry. Co.*, 55 Iowa 192, 7 N. W. 505, (plaintiff a switchman, leaning over to grasp ladder upon car to descend in performance of duty, is injured by sudden application of brake by which he is thrown from the car); *Beems v. C. B. I. & P. Ry. Co.*, 58 Iowa 150, 12 N. W. 222 (plaintiff injured while between cars and uncoupling them, engineer did not slow up as plaintiff directed); *Romick v. C. B. I. & P. Ry. Co.*, 62 Iowa 167, 17 N. W. 458 (facts same as in *Beems* case except cars were started when plaintiff was between them); *Deeds v. C. B. I. & P. Ry. Co.*, 69 Iowa 164, 28 N. W. 488 (approves rule of former cases); *Wooster v. C. M. & St. P. Ry. Co.*, 74 Iowa 593, 38 N. W. 425 (approves rule of former cases, but goes beyond them on question of knowledge; to be discussed under Case 3); *Newman v. C. M. & St. P. Ry. Co.*, 80 Iowa 672, 45 N. W. 1054 (approves former cases, rule not applicable on facts); *Connors v. B. C. R. & N. Ry. Co.*, 87 Iowa 147, 53 N. W. 1092 (orthodox rule stated; plaintiff, a brakeman, was in place where he was forbidden to be, but by use of due care injury could have been avoided); *Keefe v. C. & N. W. Ry. Co.*, 92 Iowa 182, 60 N. W. 503 (approves rule; important decision under Case 3 *infra*); *Haden v. S. C. & P. Ry. Co.*, 92 Iowa 226, 60 N. W. 537 (general rule applied, but doubtful if plaintiff was helpless. See Case 4 *infra*); *Brown v. B. C. R. & N. Ry. Co.*, 92 Iowa 408, 60 N. W. 779 (plaintiff standing on brake beam, between tender and car, for purpose of uncoupling cars, hurt when brakes are negligently set without warning); *Orr v. C. B. & M. C. Ry. Co.*, 94 Iowa 423, 62 N. W. 851 (plaintiff was struck while crossing street car tracks, doubtful if he was in helpless position, see Case 4); *Sutrin v. C. M. & St. P. Ry. Co.*, 95 Iowa 304,

The early decisions conditioned the plaintiff's recovery upon negligent acts or omissions by the defendant "after becoming aware of the injured party's negligence".²⁰ The test is somewhat ambiguous. Does it mean knowledge of the negligent thing the plaintiff has done, or knowledge of the facts which make his situation dangerous, or such knowledge plus an appreciation of the danger? The majority of the court in *Gwynn v. Duffield*²¹ considered knowledge of the plaintiff's danger or knowledge of his negligence producing danger to be the same, though this was doubted by Mr. Justice Beck. The point was further discussed by Mr. Justice Deemer in a later case²² where it was necessarily in-

63 N. W. 709 (trespassing child struck while on long trestle because of engineer's failure to stop in time); *Wilkins v. O. & C. B. R. Co.*, 96 Iowa 668, 65 N. W. 987 (plaintiff in wagon struck from behind by trolley); *McDwitt v. Des Moines St. Ry. Co.*, 99 Iowa 141, 68 N. W. 595 (plaintiff overturned in collision with street car, injured when car is started forward while plaintiff is trying to extricate himself); *Ferguson v. C. M. & St. P. Ry. Co.*, 100 Iowa 733, 69 N. W. 1026 (doctrine recognized but not applicable to facts); *Goodrich v. B. C. R. & N. Ry. Co.*, 103 Iowa 412, 72 N. W. 653 (plaintiff who is helpless because his foot is caught in guard rail is negligently run down by defendant); *Purcell v. C. & N. W. Ry. Co.*, 109 Iowa 628, 80 N. W. 682 (plaintiff's intestate struck by defendant's train while on trestle); *Morbey v. C. & N. W. Ry. Co.*, 116 Iowa 84, 89 N. W. 105 (deceased in pit working as clinker puller, negligently run into by engine); *Barry v. Burlington R. & L. Co.*, 119 Iowa 62, 93 N. W. 68 (plaintiff caught on dashboard of defendant's car which runs over him when he loses his hold); *Dale v. Colfax, etc. Coal Co.*, 131 Iowa 67, 107 N. W. 1096 (plaintiff between cars of train falls and is carried some distance when train runs over him); *Hoffard v. Ill. Cent. Ry. Co.*, 138 Iowa 543, 110 N. W. 446 (general rule recognized, not applicable to facts); *Bruggeman v. Ill. Cent. Ry. Co.*, 147 Iowa 187, 123 N. W. 1007 (plaintiff struck by train on highway crossing; may be a situation under Case 4 or Case 6 *infra*); *Davidson v. Des Moines City Ry. Co.*, 170 Iowa 467, 153 N. W. 79 (plaintiff's truck standing on street hit by street car); *Carrigan v. M. & St. L. Ry. Co.*, 171 Iowa 723, 151 N. W. 1091 (deceased run over by train after being thrown out in runaway; doctrine not applicable on facts); *Hutchinson etc. Co. v. Des Moines City Ry. Co.*, 172 Iowa 527, 154 N. W. 890 (plaintiff's truck caught on tracks and hit by defendant's car); *Joyner v. Interurban Ry. Co.*, 172 Iowa 727, 154 N. W. 936 (plaintiff's engine dies while plaintiff is on track and defendant's car hits him); *Bridenstine v. Iowa City Elec. Ry. Co.*, 181 Iowa 1124, 165 N. W. 435 (plaintiff's intestate killed while attempting to cross street car tracks in a carriage in front of defendant's negligently driven car); *Monson v. C. E. I. & P. Ry. Co.*, 181 Iowa 1354, 165 N. W. 305 (plaintiff's car is stalled on railroad crossing, and he is negligently run into by train).

²⁰ *Cooper v. Central Ry. of Iowa*, 44 Iowa 134.

²¹ 61 Iowa 64, 15 N. W. 594.

²² *Orr v. C. E. & M. C. Ry. Co.*, 94 Iowa 423, 62 N. W. 851.

volved because of the language used by the trial court in its instruction to the jury. The words of the trial judge are not important here. The court interpreted the instruction thus: "and that defendant's employe in charge of the car saw plaintiff, and knew of the fact that he was in peril, or might have known he was in peril after he saw him, by the use of ordinary care, and thereafter failed to use ordinary care to stop the car and prevent injury to the plaintiff", etc. This was held to state the law correctly. That knowledge which defendant must have is the knowledge of plaintiff's presence. If the latter's position is one of danger, the defendant is liable if, as an ordinarily prudent man, he should have appreciated the danger, and conducted himself accordingly.²³

Of course the various facts and circumstances will be most important in deciding whether the plaintiff's danger should be appreciated. An engineer could well assume in the absence of other facts, that an adult on a track would get off when a whistle is blown; the very presence of a baby by the track shows a situation of great peril. That actual appreciation of the danger is not required if the defendant should have realized it is well shown by the *Sutzin* case²⁴ where a little girl was killed on the Milwaukee road's long trestle at Marion. The engineer did not stop because he said he thought the child would get on the planking or iron span and so avoid injury. The court granted that the engineer was guilty of no more than error in judgment, and said negligence was often no more than that. The company was held liable.²⁵

Case 3. Plaintiff negligently stalls his automobile on the tracks of defendant street car company and cannot escape in time to avoid a collision with defendant's oncoming street car. The defendant's motorman could, in the exercise of due care, have discovered plaintiff's position in time to have stopped the car and avoided the colli-

²³ In an article on "The Last Clear Chance Doctrine", 2 Iowa Law Bulletin 122, Mr. F. W. Sargent states that defendant must know of the presence of the other party, and appreciate his dangerous situation. If this means "should appreciate his dangerous situation from the facts known to him" well and good; if he means must actually realize the plaintiff's danger, I respectfully dissent both on grounds of reason and authority.

²⁴ *Sutzin v. C. M. & St. P. Ry. Co.*, 95 Iowa 304, 63 N. W. 709.

²⁵ See also *Morbey v. C. & N. W. Ry. Co.*, 116 Iowa 84, 89 N. W. 105, the court says it was enough that defendant's employee appreciated plaintiff's great peril, or should have done so.

sion, but negligently fails to see him in time, and plaintiff and his property are damaged.

Plaintiff is in helpless peril. If defendant had no duty to know of his presence, the case would be like Case One, and it is clear there would be no grounds for holding defendant. But the duty on the part of defendant to keep a careful lookout for persons using the streets has been clearly and frequently discussed by the Iowa court.²⁶ So it might well be argued that when the plaintiff was helpless and the defendant should have seen plaintiff in the exercise of due care, and could have avoided the injury by due care, that defendant should be liable under the Last Clear Chance rule. Defendant literally does have such last clear chance and "there seems to be no logical reason for denying its applicability".²⁷

There should not be a distinction allowing or refusing a recovery based upon a difference between steam and street railway as such, of course,²⁸ but between cases where there was a duty on the part of the defendants to see the plaintiff and where there was not. Much authority, perhaps the majority, takes the position that there can be a recovery on facts like those in the hypothetical case.²⁹

It seems a safe statement to make that the Iowa court rejects this view, and that there can be a recovery under the Last Clear Chance rule only when the plaintiff's presence is known to the defendant. As this exception to the contributory negligence doctrine was first phrased in Iowa, as discussed previously, knowledge of the plaintiff's "negligence" was made a part of it, and no case questioned or departed from this requirement up to 1888.³⁰ At

²⁶ *Doran v. C. R. & M. C. Ry. Co.*, 117 Iowa 442, 90 N. W. 815; *Barry v. Burlington E. & L. Co.*, 119 Iowa 62, 93 N. W. 68, 95 N. W. 229; *Welsh v. Tri-City Ry. Co.*, 148 Iowa 200, 126 N. W. 1118; *Davidson v. Des Moines City Ry. Co.*, 170 Iowa 467, 153 N. W. 79; *Wilfin v. Des Moines City Ry. Co.*, 176 Iowa 642, 156 N. W. 842; *Carr v. Interurban Ry. Co.*, 171 N. W. 167.

²⁷ See Geo. H. Parmele "The Doctrine of Last Clear Chance"; Case and Comment, April, 1918, p. 885.

²⁸ See *Carr v. Interurban Ry. Co.*, 171 N. W. 167.

²⁹ *Teakle v. San Pedro, etc. Ry. Co.*, 32 Utah 276, 90 Pac. 402, and authorities cited in 2 Bohlen's Cases on Torts 1388; and see note to the *Bourrett* case, 36 L. R. A. (N. S.) 957 and authorities cited.

³⁰ The cases were: *O'Rourke v. C. B. & Q. Ry. Co.*, 44 Iowa 526; *Cooper v. Central Ry. of Iowa*, 44 Iowa 134; *Morris v. C. B. & Q. Ry. Co.*, 45 Iowa 29; *Lang v. Holiday Creek Ry. etc. Co.*, 49 Iowa 469 (here there was no evidence that defendants knew deceased was on the track, and the jury disagreed as to whether defendants could have known it in the exercise of due care); *Weymire v. Wolfe*, 52 Iowa 533, 3 N. W. 541; *McKean v. B. C. R. & N. Ry. Co.*, 55

that time the case of *Wooster v. C. M. & St. P. Ry. Co.*,³¹ treated as identical for the application of the exception to the contributory negligence rule the situation where defendant had actual knowledge of plaintiff's situation (in this instance of the presence of plaintiff's cattle on a crossing), and where he had means of knowledge. The shift in the position of the court was evidently wholly unconscious, for the *Morris* case was cited³² as authority. Rothrock, J., said:

"And the court instructed the jury, in substance, that if the employes of defendant, by the use of ordinary care and prudence, could have avoided the injury after the danger was or should have been discovered, then the defendant was guilty of negligence. In this view of the case, the contributory negligence of the plaintiff becomes immaterial, and a recovery may be had, notwithstanding the cattle were negligently driven upon the crossing."

But the decision in the *Wooster* case did not make much of an impression, for in the next cases³³ the previous rule, requiring knowledge, was reiterated, and in *Keefe v. C. & N. W. Ry. Co.*,³⁴

"This exception depends upon the failure of the person who is sought to be made liable for the injury to use reasonable care to avoid it after the negligence of the other party is known. It is not sufficient that means of knowledge were available, and not used, unless in an exceptional case".

The *Wooster* case was not even cited. The decisions then for about ten years applied the rule as it had been previously announced, always on the assumption that the defendant knew of the plaintiff's presence,³⁵ occasionally pointing out the necessity of

Iowa 192, 7 N. W. 505; *Beems v. C. E. I. & P. Ry. Co.*, 58 Iowa 150, 12 N. W. 222; *Gwynn v. Duffield*, 61 Iowa 64, 15 N. W. 594; *Romick v. C. E. I. & P. Ry. Co.*, 62 Iowa 167, 17 N. W. 458; *Deeds v. C. E. I. & P. Ry. Co.*, 69 Iowa 164, 28 N. W. 488.

³¹ 74 Iowa 593, 38 N. W. 425.

³² *Morris v. C. B. & Q. R. Co.*, 45 Iowa 29.

³³ *Newman v. C. M. & St. P. Ry. Co.*, 80 Iowa 672, 45 N. W. 1054; *Connors v. B. C. E. & N. Ry. Co.*, 87 Iowa 147, 53 N. W. 1092.

³⁴ 92 Iowa 182, 60 N. W. 503. It should be added that in this case the plaintiff was not in a helpless position by reason of any physical inability to get out of the way of the train.

it was said that:

³⁵ *Haden v. S. C. & P. R. Co.*, 92 Iowa 226, 60 N. W. 537; *Brown v. B. C. E. & N. R. Co.*, 92 Iowa 408, 60 N. W. 779; *Sutzin v. C. M. & St. P. R. Co.*, 95 Iowa 304, 63 N. W. 709; *Wilkins v. O. & C. B. E. & B. Co.*, 96 Iowa 668, 65 N. W. 987; *McDivitt v. Des Moines St. Ry. Co.*, 99 Iowa 141, 68 N. W. 595; *Ferguson v. C. M. & St. P. Ry. Co.*, 100 Iowa 733, 69 N. W. 1026; *Goodrich v. B. C. E. & N. R. Co.*, 103 Iowa 412, 72 N. W. 653; *Morbey v. C. & N. W. Ry.*

such knowledge,³⁶ until the case of *Barry v. Burlington R. & L. Co.*, in 1903.³⁷ That decision seems to have been the cause of some misunderstanding³⁸ though upon careful examination it is clear that it does not change the established rule requiring knowledge of plaintiff's presence in order to hold defendant under the Last Clear Chance rule.

The case was an action by an administrator to recover damages for the death of the decedent. The evidence tended to show that the latter had attempted to cross the street car tracks in front of one of defendant's moving cars which was in full view. He was struck while on the track, with his arm caught hold of the front of the car, and was carried some distance before the car ran over him. There was evidence that the car could have been stopped in time to have avoided running over the victim. The trial court directed a verdict and gave judgment for the defendant, which was reversed. In the Supreme Court, McClain, J., pointed out the difference between the duty of a motorman running a car on a public street and that of an engineer on the road's own right of way, with respect to the duty to keep a lookout. The motorman's duty in this respect could be considered, said the court, in the jury's determination of whether or not the decedent was seen in his position of danger. The following language makes the decision clear: "The effect of our holding is simply to say that, under the circumstances, the jury could have found that the motorman had knowledge of the danger of deceased, due to his contributory negligence, in time to have avoided the injury".

After the *Barry* case and until the case of *Bourrett v. C. & N. W. Ry. Co.*, in 1911,³⁹ no case involved the question of the necessity of actual knowledge of the injured person's position; the decisions continued to recognize it, though there was some misunderstanding

Co., 116 Iowa 84, 89 N. W. 105; *Kelley v. C. B. & Q. R. Co.*, 118 Iowa 387, 92 N. W. 45.

³⁶ *Orr v. C. R. & M. C. R. Co.*, 94 Iowa 423, 62 N. W. 851; *Purcell v. C. & N. W. Ry. Co.*, 117 Iowa 667, 91 N. W. 933; (deceased a trespasser, see *Case One*).

³⁷ 119 Iowa 62, 93 N. W. 68.

³⁸ Bishop, J., in *Doherty v. Des Moines City Ry. Co.*, 137 Iowa 358, 365, 114 N. W. 183, cites this case for the proposition that in a street railway case, evidence that plaintiff could have been seen in time to avert the catastrophe is sufficient to call the Last Clear Chance rule into operation.

³⁹ 152 Iowa 579, 132 N. W. 973.

as to what *Barry's* case had decided on this point.⁴⁰ *Bourrett's* case threshes out thoroughly the question as to the necessity of actual knowledge by defendant to make the Last Clear Chance Rule applicable. A majority of the court, speaking through Sherwin, C. J., thought the point settled by previous decisions, and that a requirement of actual knowledge was in accordance with justice and the logic of the rule of Last Clear Chance. Ladd and Weaver, JJ., dissenting, asserted that the prior cases did not settle the point and that "reasonable means of knowledge is regarded as equivalent to knowledge generally when there is a duty to investigate."⁴¹

Many cases following this decision have thoroughly settled the rule that knowledge of the plaintiff's position, on the part of defendant to make him liable under the Last Clear Chance rule must be shown.⁴² It should be stated that all the cases cited where the knowledge requirement is discussed are not entirely those where the facts raise the situation stated in the hypothetical case. The court has made its requirement of knowledge by the defendant a broad one, applicable to all situations under the Last Clear Chance.

Three decisions should be noticed which seem to slip a little from the rule as just stated. In *Davidson v. Des Moines City Ry. Co.*,⁴³

⁴⁰ *Oliver v. Iowa Central Ry. Co.*, 122 Iowa 217, 97 N. W. 1072; *Dale v. Colfax etc. Coal Co.*, 131 Iowa 67, 107 N. W. 1096; *Doherty v. Des Moines City Ry. Co.*, 137 Iowa 358, 114 N. W. 183; *Hoffard v. Ill. Cent. Ry. Co.*, 138 Iowa 543, 110 N. W. 446; *McCormick v. Ottumwa R. & L. Co.*, 146 Iowa 119, 124 N. W. 889; *Bruggeman v. Ill. Cent. Ry. Co.*, 147 Iowa 187, 123 N. W. 1007; *Welsh v. Tri-City Ry. Co.*, 148 Iowa 200, 126 N. W. 1118; (it must be admitted that this case is not at all clear. The charge of the lower court apparently made knowledge and means of knowledge equivalent. The Supreme Court said that there was evidence tending to show that the motorman did see the plaintiff. It may be that the court slipped from its rule in this decision.) *Wilson v. Ill. Cent. Ry. Co.*, 150 Iowa 33, 129 N. W. 340.

⁴¹ The discussion of the knowledge point, while useful and authoritative, is not necessary to the decision of the case, for even if the minority's point were granted, the Last Clear Chance rule would not, it is believed, apply. See page 52 *infra*.

⁴² *Clemens v. C. E. I. & P. Ry. Co.*, 163 Iowa 499, 144 N. W. 354; *Lundien v. Fort Dodge, etc. Ry. Co.*, 166 Iowa 85, 147 N. W. 308; *Carrigan v. M. & St. L. Ry. Co.*, 171 Iowa 723, 151 N. W. 1091; *Joyner v. Interurban Ry. Co.*, 172 Iowa 727, 154 N. W. 936; *Wilfin v. Des Moines City Ry. Co.*, 176 Iowa 642, 156 N. W. 842; *Carr v. Interurban Ry. Co.*, 171 N. W. 167; *Arnold v. Ft. Dodge, etc. R. Co.*, 173 N. W. 252.

⁴³ 170 Iowa 467, 153 N. W. 79.

the plaintiff's truck was drawn up in front of a store while the driver was delivering goods, in such a way that it did not clear the tracks. It was struck and injured by defendant's car. An instruction had been given to the jury to the effect that if defendant's employees knew, or should have known, that the truck was in a position of danger, in time to avoid the injury, and failed to avoid it, the defendant could be found negligent. This instruction was criticized. Weaver, J., rightly pointed out that it was not a statement of the Last Clear Chance principle, but a general statement of the duty of persons in charge of cars. But then, he added, even as a statement of Last Clear Chance it would not be erroneous. Here is where the confusion comes in. The driver of the truck upon discovering the car, signalled to the motorman to stop. The court says: "If the motorman saw the signal and failed to stop, or if he failed to see it because of his want of proper attention to his duties, then he was negligent and appellant would be liable for the damages, notwithstanding the prior negligence of the driver". That looks as though the motorman's subsequent negligence in not seeing the signal might make defendant liable under the Last Clear Chance doctrine. But the motorman himself said he had seen the car in plenty of time to have stopped before the collision.

Again in *Hutchinson etc. Co. v. Des Moines City Ry. Co.*,⁴⁴ the trial court in its directions on the Last Clear Chance rule instructed the jury as to the motorman's duty on the basis of what he saw, or in the exercise of reasonable diligence could have seen, after plaintiff's truck was in a dangerous position on the car tracks. Mr. Chief Justice Deemer said there would be force in the argument that the instruction was faulty on this point, were it not for the fact that the motorman himself had said that he had seen the truck for some time prior to the collision. The error then was harmless.

The same is true as to *Monson v. C. R. I. & P. Ry. Co.*,⁴⁵ where the plaintiff's car stalled at a crossing was hit by a train. An instruction holding defendants liable under the Last Clear Chance rule for what in the exercise of due care their employee could have seen was held not prejudicial, "because the evidence showed conclusively that the fireman and trainmen did see the plaintiff and his peril for a considerable distance before they reached the crossing, and up to the time of the collision and in time to have avoided

⁴⁴ 172 Iowa 527, 154 N. W. 890.

⁴⁵ 181 Iowa 1354, 165 N. W. 305.

the injury". It is to be hoped that the recent case of *Carr v. Interurban Ry. Co.*,⁴⁶ where the knowledge requirement was directly before the court, will definitely put this matter at rest.

Proof of the fact that defendant had knowledge of the plaintiff's presence in time to have avoided the injury requires a little more elaboration. Mention has already been made of Judge McClain's point in *Barry v. Burlington R. & L. Co.*,⁴⁷ that in view of the duty of a motorman to keep a lookout for people on the public streets, the jury may consider what the motorman could have seen in the exercise of due care in deciding whether or not he had seen the plaintiff. It had already been pointed out in a railroad case⁴⁸ that the engineer's testimony on the point was not conclusive, and if other evidence or circumstances warranted a different inference the jury were at liberty to draw it. In a later decision it was said with entire correctness, that this fact of actual knowledge "may be established without proving the possession of such knowledge by the testimony of the employes themselves".⁴⁹

The duty of the motorman to see as evidence bearing on the question of whether he did see the plaintiff has been emphasized in later cases.⁵⁰ One doubt concerning it remains. Mr. Justice Ladd says in *Wilfin v. Des Moines City Ry. Co.*,⁵¹ that "on the duty to keep a lookout and a clear field of vision may be based a finding that he [defendant] did see, in a suit against a street railway . . . why this is not so when the action is against a steam railway company, see majority opinion in *Bourrett v. Railway*". If the court is making a distinction between steam and street railways as such, it is an unfortunate and arbitrary one. The majority opinion in the *Bourrett* case does not make it. If the finding of the fact of knowledge may be evidenced by a consideration of defendant's duty to keep a lookout, it should apply to all defendants whenever the duty exists; in street railways, in steam railways at crossings,⁵² and on the railroad right of way if a person is there under such

⁴⁶ 171 N. W. 167. See also *Arnold v. Ft. Dodge, etc. R. Co.*, 173 N. W. 252.

⁴⁷ 119 Iowa 62, 93 N. W. 68, 95 N. W. 229.

⁴⁸ *Purcell v. C. & N. W. Ry. Co.*, 117 Iowa 667, 91 N. W. 933.

⁴⁹ *Dale v. Colfax etc. Coal Co.*, 131 Iowa 67, 107 N. W. 1096. See also *Monson v. C. R. I. & P. Ry. Co.*, 181 Iowa 1354, 165 N. W. 305.

⁵⁰ *McCormick v. Ottumwa R. & L. Co.*, 146 Iowa 119, 124 N. W. 889; *Carr v. Interurban Ry. Co.*, 171 N. W. 167.

⁵¹ 176 Iowa 642, 645, 156 N. W. 842.

⁵² See *Monson v. C. R. I. & P. Ry. Co.*, *supra*, and cases cited.

circumstances that the company owes a duty to watch for him. This is the view of Judge Ladd himself as is shown by his dissenting opinion in the *Bourrett* case, except that he would have made a duty to know itself sufficient for the application of the Last Clear Chance rule.

Case 4. Plaintiff stands on defendant railway company's tracks at a grade crossing, absorbed in thought and unconscious of the approach of the train. The train crew sees him in time to have appreciated that he was unconscious of danger and to have avoided a collision by the exercise of due care, but negligently fails to do so, and plaintiff is injured.

It must be assumed on the facts here that the defendant is negligent in failing to take precautions. If there is nothing to indicate to defendant's employees that plaintiff is unconscious of danger, defendant is not liable because not negligent. It may well be that ordinarily an engineer is entitled to assume that one on or near a track will remove himself from his dangerous position.⁵³ Let it be supposed here that defendant's employees see the plaintiff and should, in the exercise of due care, appreciate the fact that he is in danger and is unconscious of it.

The case differs from Case Three in that here plaintiff is not physically helpless. If he at any moment comes out of his day dream and uses his senses he will be able to protect himself. It might be well argued that defendant does not have the last clear chance here, that the opportunity of avoiding the accident is equally open to either; in fact the plaintiff in many cases could step off the track at a time when it would be impossible for defendant to stop the train. The plaintiff's negligence, on this argument, is active up to the very time of the accident; he has as good opportunity to avert it as defendant, and the rule of Last Clear Chance should not be applicable. Such a position would not be without support by authority.⁵⁴

In a well reasoned recent case in New Hampshire the line of argument just made is answered by Parsons, C. J.,^{54a}

⁵³ See 2 Bohlen's Cases on Torts, 1400 note, and also 31 L. R. A. (N. S.) 1031 note.

⁵⁴ "To warrant a recovery where both parties are present at the time of the injury . . . the ability on the part of the defendant must concur with the non-ability on the part of the plaintiff to prevent it by ordinary care." Carpenter, J., in *Nashua etc., Co. v. W. & N. Ry. Co.*, 62 N. H. 159, 163.

^{54a} *Cavanaugh v. B. & M. R. R.*, 76 N. H. 68, 79 Atl. 694.

"With substantial unanimity recovery is permitted in such cases, either upon the ground that the lack of attention in the party injured is not the proximate cause of the injury, or that the failure of the trainmen to act under such circumstances so far partakes of the nature of a wanton or intentional wrong that the law as to contributory negligence has no application".

The learned judge recognizes that neither of these explanations is sufficient, and adds further:

"It may be . . . that the real foundation for the rule is merely its fundamental justice and reasonableness. . . . The plaintiff's inability to control the situation is the test; and it is immaterial whether he is not in actual charge of the subject of the injury because absence of his body shows he could not have been, or the fact be proved by showing that for other cause he, himself, was not in control".

The Iowa cases from the start emphasized the point of defendant's lack of due care after knowledge of the plaintiff's presence in the position of danger and not the inability of the plaintiff to get out of the danger himself.⁵⁵ In many instances the plaintiff has recovered when the defendant has acted negligently after discovering plaintiff who is unconscious of danger, though upon the facts it appears that the plaintiff could himself have avoided the injury by attention to his own safety at the time the danger became imminent.⁵⁶ The court speaking through Mr. Justice Deemer in *Bruggeman v. Ill. Cent. Ry. Co.*,⁵⁷ meets this point:

"It is not true that a plaintiff cannot rely upon the doctrine [of the Last Clear Chance] if his negligence continued down to the very instant of the collision. . . . The rule for this state . . . is this: In the application of that doctrine it is not necessary to find that the negligence of the plaintiff had ceased to operate before the accident occurred, and that if it had ceased to operate, the defendant with knowledge of plaintiff's danger due to his own

⁵⁵ See *supra*, page 7, for statement of the rule adopted by the court in the early cases. It will be observed that it does not stress the plaintiff's inability to control the situation because of helpless peril rather than mere inattentiveness. And see the cases cited in note 19 *supra*. Many of those cases are in point here, in expressing the rule, if not on the facts.

⁵⁶ *Morris v. C. B. & Q. Ry. Co.*, 45 Iowa 29; *Haden v. S. C. & P. Ry. Co.*, 92 Iowa 226, 60 N. W. 537; *Orr v. C. R. & M. C. Ry. Co.*, 94 Iowa 423, 62 N. W. 851; *Wilkins v. O. & C. B. R. & B. Co.*, 96 Iowa 668, 65 N. W. 987; *Kelley v. C. B. & Q. R. Co.*, 118 Iowa 387, 92 N. W. 45; *McCormick v. Ottumwa R. & L. Co.*, 146 Iowa 119, 124 N. W. 889 (recognizes rule but holds it inapplicable to facts); *Bruggeman v. Ill. Cent. Ry. Co.*, 147 Iowa 187, 123 N. W. 1007; *Welsh v. Tri-City Ry. Co.*, 148 Iowa 200, 126 N. W. 1118; *Lundien v. Ft. Dodge etc. Ry. Co.*, 166 Iowa 85, 147 N. W. 308; *Wulfin v. Des Moines City Ry. Co.*, 176 Iowa 642, 156 N. W. 842 (*semble*).

⁵⁷ 147 Iowa 187, 123 N. W. 1007.

negligence, had failed to take reasonable precautions to avoid injury to him. It was enough to call for the application of that doctrine that the defendant's employees knew of plaintiff's danger in time to have avoided injury to him in the exercise of reasonable care, even though he was negligent in putting himself in a place of danger, and continued to be negligent in not looking out for his own safety''.

Case 5. Plaintiff's situation as that in Case Four. But defendant does not see the plaintiff in time to avoid injuring him, but could have seen him and have avoided the injury by the exercise of due care.

It should be clear that the rule of the Last Clear Chance does not apply in such a situation as this. As clearly pointed out in a recent Indiana case⁵⁸ recovery in a case like the one just considered permits a recovery by a plaintiff whose own negligence continues to the very time of his injury. The special duty on defendant's part comes from the fact that he knows the dangerous position the plaintiff is in and can see that the plaintiff is unconscious of it. Having full possession of his faculties, the defendant has the last chance to avoid the danger. But if neither is conscious of the danger in the situation, the opportunity to avoid the catastrophe is in the hands of one as much as the other. There is no room for the application of the doctrine of the Last Clear Chance.

Since Iowa holds the negligent plaintiff cannot recover even though helpless at the time the danger became imminent, unless defendant saw him in time to avoid the accident, *a fortiori*, a plaintiff should not recover in this state where he could have seen and avoided the danger as easily as could the defendant. So the cases hold.⁵⁹

Case 6. Plaintiff negligently steps on defendant's street car

⁵⁸ *Indianapolis Traction & Terminal Co. v. Croly*, (Ind. App.), 96 N. E. 973.

⁵⁹ *Gwynn v. Duffield*, 61 Iowa 64, 15 N. W. 594 (defendant knew of plaintiff's presence, but neither knew that jar out of which plaintiff was taking medicine in defendant's store contained poison); *Oliver v. Iowa Cent. Ry. Co.*, 122 Iowa 217, 97 N. W. 1072; *Powers v. Des Moines City Ry. Co.*, 143 Iowa 427, 121 N. W. 1095; *Carr v. Interurban Ry. Co.*, 171 N. W. 167. See 7 L. R. A. (N. S.) 132 note and authorities cited. The authorities on the point elsewhere are not harmonious. Sometimes a recovery is permitted. See *Louisville City Ry. Co. v. Hudgins*, 98 S. W. (Ky.) 275, 7 L. R. A. (N. S.) 152 and cases cited in the note to that case. See also *Birmingham Ry. L. & P. Co. v. Brantley*, 141 Ala. 614, 37 So. 698; *Memphis St. Ry. Co. v. Haynes*, 112 Tenn. 712, 81 S. W. 374.

track in front of a rapidly moving car, the motorman of which has negligently failed to give warning of the car's approach. The car cannot, by the exercise of due care on the part of the motorman, be stopped in time to avert a collision and plaintiff is hurt.

Clearly, despite the defendant's negligence, there can be no recovery if there is any such thing as a contributory negligence rule. Though the defendant has knowledge of the plaintiff's peril, he can do nothing to avoid the injury,—he has no last clear chance, even though the plaintiff, too, cannot avert the catastrophe. There have been several Iowa cases on this point, or which on their facts come near the case supposed.⁶⁰

The *Bourrett* case⁶¹ which occasioned such a difference of opinion among the court on the question of defendant's actual knowledge before the Last Clear Chance rule comes into operation, really belongs here as a case of this type. The plaintiff negligently ran across the railroad tracks and was run into by a train, at a crossing. There was no lookout at the rear of the train. Plaintiff was dragged some distance before being run over. If a lookout had been there, he could have had the train stopped in time to avoid the injury. But the lookout was not there, and as Chief Justice Sherwin, who gave the majority opinion, says: "The defendant's original negligence in not having a lookout left it as helpless to avoid the injury as did the original negligence of the plaintiff render him helpless to extricate himself from his perilous position".

Case 7. Plaintiff is crossing a street and sees defendant's car approaching. Defendant sees the plaintiff, but the former handles his car, and the latter his own person, so carelessly, that a collision takes place and plaintiff is injured.

This case is almost too obvious for discussion. When each party is aware of the other, and each doing a negligent act at the very time of the injury, defendant's chance is no later than plaintiff's. Either can avoid the injury by due care. Neither does. The case

⁶⁰ *Doherty v. Des Moines City Ry. Co.*, 137 Iowa 358, 114 N. W. 183; *Wilson v. Ill. Cent. Ry. Co.*, 150 Iowa 33, 129 N. W. 340; *Wolfe v. C. G. W. R. Co.*, 166 Iowa 506, 147 N. W. 901; *Carrigan v. M. & St. L. Ry. Co.*, 171 Iowa 723, 151 N. W. 1091 (though here the court thought the injury caused by an accidental runaway not the fault of either party); *Oaks v. C. R. I. & P. Ry. Co.*, 174 Iowa 648, 156 N. W. 740. Perhaps *Bruggeman v. Ill. Cent. Ry. Co.*, 147 Iowa 187, 123 N. W. 1007, also belongs here on its facts.

⁶¹ 152 Iowa 579, 132 N. W. 973.

is a plain one for the application of the ordinary rule of contributory negligence.⁶²

Case 8. Plaintiff in his motor car negligently attempts to cross defendant railroad company's track at a public crossing in full view of an oncoming train, when his engine stops. The train is going at an excessive rate of speed, and the engineer sees plaintiff and could have stopped the train, and avoided the accident if the brakes had worked properly. Failure of the brakes so to work was due to negligent inspection by one of defendant's employees before the locomotive began its run for the day. Plaintiff is injured.

A recent case in the British Privy Council permitted a plaintiff to recover on almost identical facts.⁶³ The American authority is stated by Professor Bohlen:⁶⁴

"The overwhelming weight of authority in America is to the effect that a precedent act of negligence, whether of commission or omission, whereby the defendant has put it out of his power to avert the accident after discovering that it is impending, does not make him responsible to a plaintiff who has through his negligence, exposed himself to the peril, and, this is so though the plaintiff's negligence consists not merely of an inadvertence or absent-mindedness which precludes him from exercising his power of self-protection, but is some more or less deliberate act which placed him in a helpless position in the path of danger".

A recent Iowa decision⁶⁵ leaves it at least doubtful what the Iowa Supreme Court's view of this situation is. The plaintiff's intestate was killed when one of defendant's cars collided with a carriage in which deceased was riding, while crossing the street car tracks. The court considered that there was ample evidence of defendant's negligence for the jury, and that the question of contributory negligence of plaintiff's intestate was likewise a jury question. Upon the question of the applicability of the Last Clear Chance rule the court said that "the jury might well find that the motorman, had he been in the exercise of reasonable care, could have prevented the collision". Further on, but while discussing the Last Clear Chance, the court says:

"Even if it be conceded, as argued by counsel, that the motorman was un-

⁶² *Clemens v. C. R. I. & P. Ry. Co.*, 163 Iowa 499, 144 N. W. 354; *Robbins v. Weed*, 169 N. W. 772.

⁶³ *British Columbia Ewy. Co. v. Loach*, [1916] 1 A. C. 719.

⁶⁴ 66 U. of Pa. Law Rev. 73, 76, a note commenting on the *Loach* case.

⁶⁵ *Bridenstine v. Iowa City Elec. Ry. Co.*, 181 Iowa 1124, 165 N. W. 435.

able to stop the car, this would not necessarily relieve the defendant of the charge of negligence if the failure of the motorman to control the car was due to the fact that he was handicapped in his effort by the result of his own carelessness in attaining such high rate of speed".⁶⁶

If this means that defendant is liable under the Last Clear Chance rule, even though the motorman did everything in his power to stop the car when he saw the danger, because of his antecedent negligence in attaining an excessive speed, it is to be regretted that the result was reached without fuller consideration of principle and authority. The motorman no doubt was guilty of negligence in attaining such a speed on a city street that he could not stop within a reasonable distance. But more than such antecedent negligence is necessary to call the Last Clear Chance doctrine into operation. To say it applies here seems highly inconsistent in a jurisdiction which holds it inapplicable where a defendant can avoid injury to a helpless plaintiff with the means at his command, if he but uses his eyes, but fails to do so.

Allowing a plaintiff to recover in a case like Case Eight supposed, may be in accordance with justice.⁶⁷ But it is a contradiction in terms to allow such recovery under the rule of Last Clear Chance, and it is to be hoped that we shall have fuller discussion on the point before it becomes settled law in Iowa.

COLLEGE OF LAW

HERBERT F. GOODRICH.

STATE UNIVERSITY OF IOWA

Following is a list of Iowa cases wherein the Supreme Court has dealt, in decision or dictum, with the rule of Last Clear Chance. No attempt has been made in this list to mark the important ones which are cited and most of them discussed in the preceding pages.

1870 *Spencer v. Ill. Cent. Ry. Co.*, 29 Iowa 55.

⁶⁶ Compare on this point, apparently exactly *contra*, *Trigg v. Water etc. Co.*, 215 Mo. 521, 114 S. W. 972; and this language in *Smith v. Norfolk etc. R. Co.*, 114 N. C. 728, 25 L. R. A. 287, ". . . if the engineer discovered the deceased as soon as he could have done so by keeping a proper lookout and immediately applied all the means within his control to avoid the collision, and his failure to do so was by reason of the improper equipment of the train (an omission of duty which might have existed for weeks or months) then the negligence of the defendant would be no more proximate than that of the deceased, and there would be no ground whatever for the operation of the principle of *Davies v. Mann*."

⁶⁷ Might the rate of speed attained by the car in the *Bridenstine* case which the court referred to as "reckless" show the defendant guilty of reckless and wanton misconduct, and make deceased's contributory negligence irrelevant on this ground?

- 1876 *O'Hourke v. C. B. & Q. Ry. Co.*, 44 Iowa 526.
1876 *Cooper v. Central Ry. of Iowa*, 44 Iowa 134.
1876 *Morris v. C. B. & Q. Ry. Co.*, 45 Iowa 29.
1878 *Lang v. Holiday Creek Ry. etc. Co.*, 49 Iowa 469.
1879 *Weymire v. Wolfe*, 52 Iowa 533, 3 N. W. 541.
1880 *McKean v. B. C. E. & N. Ry. Co.*, 55 Iowa 192, 7 N. W. 505.
1882 *Beems v. C. E. I. & P. Ry. Co.*, 58 Iowa 150, 12 N. W. 222.
1883 *Gwynn v. Duffield*, 61 Iowa 64, 15 N. W. 594; S. C. 66 Iowa 708, 24 N. W. 523.
1883 *Romick v. C. E. I. & P. Ry. Co.*, 62 Iowa 167, 17 N. W. 458.
1886 *Deeds v. C. E. I. & P. Ry. Co.*, 69 Iowa 164, 28 N. W. 488.
1888 *Wooster v. C. M. & St. P. Ry. Co.*, 74 Iowa 593, 38 N. W. 425.
1890 *Newman v. C. M. & St. P. Ry. Co.*, 80 Iowa 672, 45 N. W. 1054.
1893 *Connors v. B. C. E. & N. Ry. Co.*, 87 Iowa 147, 53 N. W. 1092.
1894 *Keefe v. C. & N. W. Ry. Co.*, 92 Iowa 182, 60 N. W. 503.
1894 *Haden v. S. C. & P. Ry. Co.*, 92 Iowa 226, 60 N. W. 537.
1894 *Brown v. B. C. E. & N. Ry. Co.*, 92 Iowa 408, 60 N. W. 779.
1895 *Orr v. C. E. & M. C. Ry. Co.*, 94 Iowa 423, 62 N. W. 851.
1895 *Sutzin v. C. M. & St. P. Ry. Co.*, 95 Iowa 304, 63 N. W. 709.
1896 *Wilkins v. O. & C. B. Ry. Co.*, 96 Iowa 668, 65 N. W. 987.
1896 *McDivitt v. Des Moines St. Ry. Co.*, 99 Iowa 141, 68 N. W. 595.
1897 *Ferguson v. C. M. & St. P. Ry. Co.*, 100 Iowa 733, 69 N. W. 1026.
1897 *Goodrich v. B. C. E. & N. Ry. Co.*, 103 Iowa 412, 72 N. W. 653.
1899 *Purcell v. C. & N. W. Ry. Co.*, 109 Iowa 628, 80 N. W. 682; S. C., 1902, 117 Iowa 667, 91 N. W. 933.
1902 *Morbey v. C. & N. W. Ry. Co.*, 116 Iowa 84, 89 N. W. 105.
1902 *Kelley v. C. B. & Q. Ry. Co.*, 118 Iowa 387, 92 N. W. 45.
1903 *Barry v. Burlington R. & L. Co.*, 119 Iowa 62, 93 N. W. 68, 95 N. W. 229.
1904 *Oliver v. Iowa Cent. Ry. Co.*, 122 Iowa 217, 97 N. W. 1072.
1906 *Dale v. Colfax etc. Coal Co.*, 131 Iowa 67, 107 N. W. 1096.
1908 *Doherty v. Des Moines City Ry. Co.*, 137 Iowa 358, 114 N. W. 183.
1909 *Powers v. Des Moines City Ry. Co.*, 143 Iowa 427, 121 N. W. 1095.
1910 *McCormick v. Ottumwa R. & L. Co.*, 146 Iowa 119, 124 N. W. 889.
1910 *Bruggeman v. Ill. Cent. Ry. Co.*, 147 Iowa 187, 123 N. W. 1007.
1910 *Welsh v. Tri-City Ry. Co.*, 148 Iowa 200, 126 N. W. 1118.
1911 *Wilson v. Ill. Cent. R. Co.*, 150 Iowa 33, 129 N. W. 340.
1911 *Bourrett v. C. & N. W. Ry. Co.*, 152 Iowa 579, 132 N. W. 973.
1914 *Clemens v. C. E. I. & P. Ry. Co.*, 163 Iowa 499, 144 N. W. 354.
1914 *Lundien v. Ft. Dodge etc. Ry. Co.*, 166 Iowa 85, 147 N. W. 308.
1914 *Wolfe v. C. G. W. Ry. Co.*, 166 Iowa 506, 147 N. W. 901.
1915 *Davidson v. Des Moines City Ry. Co.*, 170 Iowa 467, 153 N. W. 79.
1915 *Carrigan v. M. & St. L. Ry. Co.*, 171 Iowa 723, 151 N. W. 1091.
1915 *Hutchinson etc. Co. v. Des Moines City Ry. Co.*, 172 Iowa 527, 154 N. W. 890.
1915 *Joyner v. Interurban Ry. Co.*, 172 Iowa 727, 154 N. W. 936.
1916 *Oaks v. C. E. I. & P. Ry. Co.*, 174 Iowa 648, 156 N. W. 740.
1916 *Wilfin v. Des Moines City Ry. Co.*, 176 Iowa 642, 156 N. W. 842.
1917 *Bridenstine v. Iowa City Elec. Ry. Co.*, 181 Iowa 1124, 165 N. W. 435.

- 1917 *Monson v. C. R. I. & P. Ry. Co.*, 181 Iowa 1354, 165 N. W. 305.
1918 *Robbins v. Weed*, 169 N. W. 773.
1919 *Carr v. Interurban Ry. Co.*, 171 N. W. 167.
1919 *Arnold v. Ft. Dodge, etc. R. Co.*, 173 N. W. 252.

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THE COLLEGE OF LAW.—After decreased attendance during the war, the registration in the College of Law is now approaching its normal level. While the numbers in the two upper classes is small, due to the loss of men who left for military service and have since gone into other occupations than law, the beginning class exceeds in size by more than fifty per cent any class since the two year college entrance requirement went into effect. Following is the comparison with the year 1916-1917:

	FIRST YEAR	SECOND YEAR	THIRD YEAR	TOTAL
1916-1917....	50	37	48	135
1919-1920....	79	31	28	138

A special summer session of eleven weeks enabled men returning from the army by January, 1919, to complete a full year's college work from January to September, and made it possible for a good sized number to finish their law course without loss of time.

The Dillon first and second year prizes of \$50.00 each, awarded to students who in the first and second year classes attain the highest rank upon the general examination grades in their respective courses have been awarded to William B. Sloan of Iowa Falls (second year) and Edward F. Rate of Iowa City (first year).

RECENT CASES

BOUNDARIES—ACQUIESCENCE—DURATION NECESSARY TO ESTABLISH.—The plaintiff and defendant were owners of adjoining lots; the fence of the defendant was too far over on the land of the plaintiff who brought an action to quiet title in himself in the strip of land in dispute. Defendant sets up as a defense that a fence was built between the two lots in 1905 which was acquiesced in by both parties and that the plaintiff was now estopped from setting up that this fence was not the true boundary. In 1911 there was a survey and the true line established as claimed by plaintiff and since that time the plaintiff has not acquiesced in the fence. Held, that as the acquiescence was not for ten years, plaintiff was not estopped and title should be quieted in him. *Evert v. Turner*, 169 N. W. 625. (Iowa Sup. Ct.)

The question in Iowa as to just how long parties must acquiesce in a fence before they are estopped from claiming that it is not the true boundary appears to be still a somewhat doubtful question. The Iowa court has repeatedly held that no matter where the true line may be, if between the properties there is erected a fence which definitely marks a line dividing the two properties, and this line is acquiesced in and recognized by parties on either side as the true line for more than ten years, then such line becomes the dividing line between the parties, without regard to the government lines, and without regard to the lines fixed in the deeds, and neither party can thereafter disturb it or claim the dividing line to be other than that acquiesced in. *Tice v. Shangle*, 164 N. W. 246 (Iowa); *Dwight v. City of Des Moines*, 174 Iowa 178, 156 N. W. 336. Where the parties have acquiesced in such dividing line for less than ten years a different question arises. It would seem that if a clear case of acquiescence could be made out such as an express agreement or unequivocal overt acts, then the parties would be estopped from claiming the line to be different from the one clearly acquiesced in, though the acquiescence has been for less than the statutory period. Such was the situation in *Gibson v. Schultz*, 116 N. W. 140, and *Kitchen v. Chantland*, 130 Iowa 618, 105 N. W. 367, where the court held that if it can be shown that parties clearly acquiesced in a certain fence, it is not necessary that they hold up to this fence for ten years before they are estopped from claiming that the fence is not the true boundary. Most of the cases involving the acquiescence doctrine have been cases where the fence has existed for more than ten years and they are all agreed that where acquiescence is to be presumed from lapse of time only, the presumption becomes conclusive upon the running of the statute of limitations. *Dwight v. City of Des Moines*, *supra*; *Griffith v. Murray*, 166 Iowa 380, 147 N. W. 855; *Miller v. Mills County*, 111 Iowa 654, 82 N. W. 1038.

In the recent case of *Evert v. Turner*, stated above, it does not clearly appear whether there was an express acquiescence by both

parties or acquiescence implied from unequivocal acts. The plaintiff, who denied that the fence is the true line, himself built the fence and hence it is clear that he acquiesced in it at the time, but there is no showing of acquiescence on the part of the defendant. In order that estoppel may arise through acquiescence it must appear that both parties acquiesced in the line as made. It involves the idea that both parties knew of the line as established and the possession taken and assented thereto. *Dwight v. City of Des Moines, supra*. If such is the situation then *Evert v. Turner* might be distinguished from the former Iowa cases holding that where acquiescence is to be presumed from the lapse of time only, the statutory period must have run before the parties are estopped. But if there was a clear acquiescence on the part of the defendant in that case, either by express agreement or unequivocal acts, then the case is apparently in conflict with *Gibson v. Schultz, supra*, and *Kitchen v. Chantland, supra*.

Though the situation in Iowa seems somewhat unsettled, the probable result of the decision of *Evert v. Turner* will be to require acquiescence for the statutory period before either party is estopped from denying that the line acquiesced in is the true boundary. For a more comprehensive discussion of the acquiescence doctrine see 4 Iowa Law Bulletin 51.

CLYDE E. JONES.

CORPORATIONS—STOCKHOLDER'S LIABILITY ON SUBSCRIPTION—FRAUD AS A DEFENSE WHEN THE CORPORATION IS INSOLVENT.—The defendant, induced by the alleged fraudulent representations of agents of the corporation, subscribed for shares of stock in the Iowa Mercantile Company. The corporation became insolvent and the receiver brought this action to recover the amount of the defendant's unpaid subscription. Held, that the exclusion by the trial court of evidence of the alleged fraud was reversible error. *Lamb v. Bonesteel*, 173 N. W. 13. (Iowa Sup. Ct.)

When a corporation is solvent and a going concern, it is clear that a subscriber induced to become such by fraud may rescind his subscription contract; providing only that he has been diligent in discovering the fraud and in repudiating the contract after its discovery. *Fear v. Bartlett*, 81 Md. 435, 32 Atl. 322; *Beal v. Dillon*, 5 Kan. App. 27, 47 Pac. 317; *Hinkley v. Sac Oil Co.*, 132 Iowa 396, 107 N. W. 629. But when the corporation has become insolvent an entirely different situation arises. It is then a question of the relative equities of the defrauded subscriber and the creditors of the company. The well-established and inflexible English rule denies the right of rescission after winding-up proceedings have been commenced against the corporation. *Henderson v. Royal British Bank*, 7 El. & Bl. 356; *Oakes v. Turquand*, L. R. 2 H. L. 325. The American courts have made some qualification of the rigid English rule, and insolvency alone and by itself is not a complete bar to the subscriber's right of rescission. After the insolvency, the defrauded

subscriber may yet rescind his contract providing that corporate indebtedness has not been incurred subsequent to the subscription, and that he has not estopped himself from insisting on the fraud, and that he has not been guilty of a want of due diligence in discovering the fraud and in repudiating the contract after its discovery. *Newton National Bank v. Newbegin*, 20 C. C. A. 339, 74 Fed. 135; *Gress v. Knight*, 135 Ga. 60, 68 S. E. 834; *Independent Van and Storage Co. v. Iowa Mercantile Co.*, 168 N. W. 782.

The instant case recognizes the right of rescission after insolvency. By dictum it denies that right when debts have been incurred by the corporation subsequent to the defrauded shareholder's subscription. This dictum is supported by the American decisions. *Morrissey v. Williams*, 74 W. Va. 636, 82 S. E. 509; *Southern Tobacco Co. v. Armstrong*, 11 Ga. App. 501, 75 S. E. 828; *Marion Trust Co. v. Blish*, 170 Ind. 686, 85 N. E. 344. Participation in the management of the corporation and sharing in its dividends will estop the subscriber from setting up the fraud. *Meholin v. Carlson*, 17 Idaho 742, 107 Pac. 755. Rescission is most frequently denied because of a want of due diligence in discovering the fraud. No exact definition of the amount of diligence required can be given as it is a jury question dependent for its determination upon the circumstances of each individual case. It seems settled that there may be such lack of diligence as to prevent rescission although the subscriber had no knowledge, actual or constructive, of the fraud. *Reid v. Owensboro Savings Bank and Trust Co.*, 141 Ky. 444, 132 S. W. 1026; *Johnson v. Morgan*, 178 Iowa 577, 160 N. W. 2.

DAMAGES — BREACH OF COVENANT AGAINST INCUMBRANCES — AMOUNT OF RECOVERY.—The defendant conveyed real estate to the plaintiff with a covenant against incumbrances. The plaintiff later conveyed, with a similar covenant, to a third party who brought action for the breach of the covenant. The plaintiff informed the defendant of the pending suit and asked him to defend, which he refused to do. Judgment was rendered against the plaintiff on the merits of the case, and he now sues the defendant upon the original covenant. The trial court allowed the plaintiff to introduce in evidence the amount of the former judgment. Held, that such evidence was inadmissible. *Ballou v. Clark*, 171 N. W. 682. (Iowa Sup. Ct.)

When the original covenantor has been notified by his covenantee of the pendency of the suit, has been requested to defend, and has refused to do so, in the absence of fraud or collusion, the judgment rendered against the covenantee is conclusive evidence of the existence of the incumbrance. *Andrews v. Davison*, 17 N. H. 413. The Iowa court, however, has limited the introduction of the former judgment for this purpose only, and has held that the amount of damages recovered against the covenantee is not binding upon the covenantor. *Myers v. Munson*, 65 Iowa 423, 21 N. W. 759. The controlling factor in bringing the court to this result seems to be

that the damages awarded for the breach of a covenant against incumbrances must not exceed the total consideration, plus interest, paid for the land. *Schimmelpfenning v. Brunk*, 153 Iowa 177, 132 N. W. 838. The amount of this consideration should be pleaded and proved by the defendant if he is to obtain advantage of this limitation to the original consideration, for the Iowa court has held that the amount paid to remove an incumbrance is presumptively the measure of damages, and has refused to modify a judgment which exceeded the original consideration, in the absence of pleading or proof of this consideration. *Boice v. Coffeen*, 158 Iowa 705, 138 N. W. 857. In *Myers v. Munson*, mentioned above, it was decided that the damages resulting from a permanent incumbrance should be the difference between the value of the land with the incumbrance and without it, and that this value should be taken as of the time of the conveyance. Where we have two independent conveyances with similar covenants, as in the principal case, the constant fluctuation of land values clearly shows that the amount of damages recovered upon one covenant cannot be a criterion for the amount recoverable upon the other covenant. If the damages were not limited to the consideration paid, but rather to the value of the premises at the time of the actual breach (8 AMERICAN & ENGLISH ENCYC. 178) the amount of damages should be the same in either case, and there should be no reason for excluding the judgment of the former trial.

It is generally conceded that taxable costs should be recovered. *Swartz v. Ballou*, 47 Iowa 188. As to attorney fees, there is a split of authority, but the general rule, in a situation like the principal case where the original covenantor has been notified of the pending suit and asked to defend it, is that reasonable fees should be allowed. *Meservey v. Snell*, 94 Iowa 222, 62 N. W. 767; *Richards & Comstock v. Fredrickson*, 171 Iowa 669, 153 N. W. 151; *Alexander v. Staley*, 110 Iowa 607, 81 N. W. 803.

DEEDS—CONVEYANCES TO TAKE EFFECT UPON DEATH OF GRANTOR—LIMITATION ON GRANT.—The defendant based his title upon an instrument in the form of a warranty deed reciting valuable consideration which purported to sell and convey certain land to the defendant. The deed contained the following clause, "The title to this land is not to pass while I live. This deed to be held in escrow at the Shenandoah National Bank, Shenandoah, Iowa, to be delivered at my death." The plaintiff's petition asked that this deed be declared void as it did not purport to grant any present interest in the land, and was not properly executed as a testamentary disposition of the property. Held, that the deed was a valid conveyance, vesting the fee at once in the grantee, with a life estate reserved in the grantor. *Bradley v. Bradley*, 171 N. W. 729. (Iowa Sup. Ct.)

In a case similar on its facts the Iowa Supreme Court at first held that the clause that the deed take effect upon the death of the grantor postponed the passing of title till the death of the grantor

and rendered the instrument testamentary and therefore void because not properly attested. *Shaul v. Shaul*, 160 N. W. 36. This holding was criticized as unsound in a note in 3 Iowa Law Bulletin, 170-173, and on rehearing the instrument was upheld as a valid deed. *Shaul v. Shaul*, 166 N. W. 301. The principal case follows the second decision on the rehearing.

From these two decisions it may be said that the rule in Iowa now is that an express clause in a deed, limiting it to take effect upon the death of the grantor, does not invalidate the deed but vests the fee at once in the grantee, with a life estate reserved in the grantor. Thus the Supreme Court has gotten away in effect from the unfortunate ruling in *Leaver v. Gauss*, 62 Iowa 314, 17 N. W. 522, that Code §2917 which allows the grant of a freehold in futuro does not permit a deed to effect a future transfer of the title. Perhaps it is not too much to hope that in the future the court will definitely overturn that ruling.

DIVORCE—ALIMONY—EFFECT OF REMARRIAGE ON DECREE.—The plaintiff had obtained a divorce from the defendant and a decree for \$75 a month alimony. After six months the plaintiff married another man and the defendant refused further payments of alimony. Three years later he applied for a modification of the decree and the decree was cancelled from the date of application. The district court held, (1) that the remarriage of a divorced wife does not *ipso facto* cancel the obligation to pay alimony, and (2) that the court has the power to cancel accrued installments. The defendant appealed. Held, that the order was within the discretion of the trial court and should be sustained. *Hartigan v. Hartigan*, 171 N. W. 925. (Minn. Sup. Ct.)

That, when a divorced wife remarries, the obligation of her former husband to pay alimony is not *ipso facto* cancelled, is a well established doctrine. *Gordon v. Baker*, 182 Ill. App. 587; *Cary v. Cary*, 217 N. Y. 670, 112 N. E. 1055; *Brandt v. Brandt*, 40 Ore. 477, 67 Pac. 508; *Olney v. Watts*, 43 Ohio St. 499, 3 N. E. 354; *Emerson v. Emerson*, 120 Md. 584, 87 Atl. 1033; *contra*, *Morgan v. Lowman*, 80 Ill. App. 557; *Linton v. Hall*, 86 Misc. 560, 149 N. Y. Supp. 385. But it is also generally held that such remarriage of the wife furnishes adequate grounds for the cancellation or modification of the order. *Brandt v. Brandt*, *supra*; *Cohen v. Cohen*, 150 Cal. 99, 88 Pac. 267; *Gordon v. Baker*, *supra*. If it appears that the second husband is unable to provide for the wife, the decree may be only slightly modified or left unchanged. *King v. King*, 38 Ohio St. 370; *Southworth v. Southworth*, 168 Mass. 511, 47 N. E. 93; *Wetmore v. Wetmore*, 162 N. Y. 503, 56 N. E. 997. In Iowa a case involving the effect of remarriage of a divorced wife on the alimony order seems not to have arisen. For a discussion of the power of the court to modify a decree of alimony see 4 Iowa Law Bulletin 204.

In regard to cancelling accrued installments of alimony there is some conflict of authority in Illinois and New York. Unlike an

ordinary money judgment, most jurisdictions hold that accrued installments may be cancelled. *Linton v. Hall*, 86 Misc. 560, 149 N. Y. Supp. 385; *Southworth v. Southworth*, 168 Mass. 511, 47 N. E. 93; *Stillman v. Stillman*, 99 Ill. 196, 39 Am. Rep. 21; *contra*, *Craig v. Craig*, 163 Ill. 176, 45 N. E. 153; *Cary v. Cary*, 153 N. Y. Supp. 712; *Delbridge v. Sears*, 179 Iowa 526; 160 N. W. 218, holds that all installments of alimony accrued before a decree cancelling it is given, are vested. No fact of remarriage was involved in this case, but there were other changes of conditions after the original decree was given.

In England the provision that alimony shall continue "*dum sola et casta vixerit*" is usually inserted in the original decree. In such cases alimony is cut off by the remarriage. *Kettlewell v. Kettlewell*, [1898] P. 138; *Chetwynd v. Chetwynd*, L. R. 1 P. & D. 39. If the provision "*dum sola et casta vixerit*" is omitted the remarriage of the wife does not authorize the annulment or modification of the decree. *Lander v. Lander*, [1891] P. 161; *Wood v. Wood*, [1891] P. 272.

HEALTH—POWER OF HEALTH BOARD—DETENTION OF PERSON AFFLICTED WITH VENEREAL DISEASE.—The petitioner, arrested as "an inmate of an ill-governed house", was tried upon this charge and found guilty. On appeal to the district court, she was released on bond but was immediately seized by health officers of the city of Omaha, examined, and placed under quarantine at the city hospital, the examination having revealed communicable venereal virus. Habeas corpus proceedings were instituted to secure her release. Held, the writ should be dismissed. *Ex parte Brown*, 172 N. W. 522. (Neb. Sup. Ct.)

General power to formulate and enforce rules concerning public health and the prevention and spread of disease is vested in the state and county Boards of Health by Neb. Rev. Stat. §§2710, 2714. The power to quarantine is expressly granted by §2738. Under powers granted to municipalities, §§4082, 4094, the mayor and council of cities may prescribe rules and regulations for the care, treatment, and prevention of contagious and infectious diseases. The city of Omaha by ordinances created such regulations, the officers in the principal case acting under that authority.

Similar statutory provisions have been made in practically all states, Iowa being among the number. Code §§2565, 2568, 2570. Venereal disease in Iowa is expressly recognized as contagious and infectious. Code Supp. 1913 §2575-a6a. The constitutionality of provisions for quarantine of communicable diseases has been many times attacked but has been universally upheld by the courts as being within the police power of the state and if reasonable not the subject of complaint. *Minneapolis St. P. & S. S. M. R. Co. v. Gilner*, 57 Fed. 276; *Hengehold v. City of Covington*, 108 Ky. 752, 57 S. W. 495; *Clinton v. Clinton*, 61 Iowa 205, 16 N. W. 87; 12 C. J. 1311, 1266, 912. The court, in *Ex parte Brown*, experienced no

hesitation in upholding the action of the health officers, it being clearly permissible under the statutory grant of power. It is to be noted that the petitioner had been found to be infected with venereal disease, and the only question involved was whether she could legally be detained for treatment.

During the course of the opinion in the principal case, the Iowa case of *Wragg v. Griffin*, 170 N. W. 400, was cited and distinguished. In that case, officers of the city of Des Moines acting under a city ordinance regulating public health sought to compel the petitioner, who had been arrested on a charge of lewdness, to submit to a physical examination including the "Wasserman test" for syphilis, which involved taking a blood sample. The petitioner instituted habeas corpus proceedings. Held, that the restraint amounted to deprivation of liberty without due process of law.

The Iowa case, in raising the question whether or not one could be forced to submit to a physical examination on mere suspicion of venereal disease, caused the court fully to review the statutes governing the action and powers of the Board of Health. No express authority being found to compel submission to an examination of this nature, the petitioner was ordered released, the court cautiously refusing to imply such general powers in the absence of express legislative authority. This decision has been followed by a clear and definite expression of the Legislature, 38 G. A., Chap. 299, §9, providing that persons reasonably suspected of being infected with syphilis in the infectious stages, gonococcus infection, or chaneroid, must be examined by the local health officer.

There still remains therefore the interesting question not involved in either *Ex parte Brown* or *Wragg v. Griffin* as to the validity of such a compulsory examination under the "due process" clause of state and federal constitutions.

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NONNEGOTIABLE BILLS AND NOTES

The rules governing negotiable bills of exchange and promissory notes are for the most part well defined and firmly established. It is the purpose here to discuss in what respect, if any, the rights and liabilities of the holder of a bill or note, not negotiable in form, differ from the rights and liabilities of one who holds an ordinary contract chose in action in writing by which the promisor has obligated himself to deliver money or property or to do any other act beneficial to the promisee. What effect Iowa statutory provisions have upon the rights of either holder will also be considered.

While we now think of bills and notes as negotiable paper, it was not until long after the document known as a bill of exchange had come into extensive use that negotiable qualities were recognized. When bills first began to be used, at least six hundred years ago, it was at a time when means of communication were slow, dangerous, and uncertain. Bills were used in order that a debtor could at the same time make a remittance and collect a debt due him without the hazard and expense of transportation of specie. If a merchant in England could pay his creditor on the continent by an order on the merchant's debtor there to pay the creditor, the object of the use of the bill was accomplished without raising any question of negotiability whatever. When Malynes wrote his book on the law merchant in 1622, his form for a bill of exchange contained no words of negotiability. "It is clear", says Professor Holdsworth, "that the bill has not yet become a negotiable instrument".¹ By

¹ For a complete and scholarly discussion of the history of Bills and Notes, see W. S. Holdsworth, "Origins and Early History of Negotiable Instruments", 31 Law Quart. Rev. 12, 173, 376, Vol. 32, p. 20. See also CHITTY, *BILLS OF EXCHANGE*, 10th ed., pp. 10a, 11; NORTON on *BILLS AND NOTES*, 4th ed., pp. 10 and 11, notes.

1651 "order" instruments had in mercantile practice become transferable by indorsement and delivery. But this is but a small part of negotiability as we know it today.^{1a} The notion that the indorsee could enforce the instrument free from defenses had not yet appeared in the law, nor was it established for some time to come. So when modern authorities state unqualifiedly that negotiability is not essential to the validity of a bill or note^{1b} they but state an historic fact.

Nevertheless it is negotiable paper which is commercially important nowadays. In the form of a bill of exchange or draft, promissory note, and the familiar bank check, it is widely, almost universally, used in place of money, in nearly every business transaction. The growing emphasis on negotiable instruments has caused its humbler nonnegotiable predecessor almost to sink from sight. So important is negotiable paper in modern business and so great is the need for identical rules in the subject in all our States that a uniform negotiable instruments statute was the first step in the movement for uniform State laws. The Negotiable Instruments Law² was adopted in Iowa by the 29th General Assembly³ and is now in force everywhere in the United States except in Georgia and Texas. The whole purpose of the statute, as seen from its title⁴ to its last section, shows it was dealing only with negotiable instruments, and so the cases hold.⁵

^{1a} Cf. MACHAN, MODERN LAW OF CORPORATIONS, §837, "Negotiability is an attribute of certain choses in action and consists of two parts or elements—first, an exception to the rule that choses in action are non-assignable, and, second, an exception to the rule that a transferor of personal property can pass to an assignee no greater legal title than he himself possesses."

^{1b} *Fullerton Lbr. Co. v. Snouffer*, 139 Iowa 176, 178, 117 N. W. 50; *Wells v. Brigham*, 6 Cush. 6, 52 Am. Dec. 750; *Seymour v. Van Slyck*, 8 Wend. (N. Y.) 403; *Coursin v. Ledlie*, 31 Pa. St. 506; *Arnold v. Sprague*, 34 Vt. 402; *Averett v. Booker*, 15 Gratt (Va.) 163, 76 Am. Dec. 203; *Mehlberg v. Tisher*, 24 Wis. 607.

² This statute was recommended for passage by the Conference of Commissioners on Uniform State Laws in 1896. BRANNON, NEGOTIABLE INSTRUMENTS LAW, 2nd ed., p. 221.

³ Code Supp., §3060a. References to the statute will be made to the sections of the uniform act, which are the same in the code except for the provision "3060a" preceding the number of the section.

⁴ "A GENERAL ACT RELATING TO NEGOTIABLE INSTRUMENTS (BEING AN ACT TO ESTABLISH A LAW UNIFORM WITH THE LAWS OF OTHER STATES ON THAT SUBJECT)."

⁵ *Wettlaufer v. Baxter*, 137 Ky. 362, 125 S. W. 741; *Reynolds v. Vint*, 73 Ore. 528, 144 Pac. 526; *Westberg v. Chicago Lbr. & Coal Co.*, 117 Wis. 589, 94

The chief differences between negotiable and nonnegotiable paper are said in a recent work⁶ to be three: (1) In case of nonnegotiable paper it is necessary to give notice to the debtor in order that the assignee may hold free from equities arising after the assignment, which is not true where the instrument is negotiable; (2) the holder of a negotiable bill or note has power to transfer free from equities, which is not true of nonnegotiable instruments; (3) there is a presumption of consideration in the case of negotiable bills and notes, but no such presumption with those not negotiable. The last of these will be fully discussed later. The first two, it will be observed, are matters promoting the circulation of negotiable paper as a substitute for money, and mark the clear and important distinction between this type of chose in action and any other. While the debtor's payment or settlement with a promisee or a subsequent assignee of a nonnegotiable bill or note will discharge him from liability to the first assignee of whose rights he had no notice,⁷ such payment is no defense to the maker of a negotiable instrument which has been indorsed by the payee, and the latter has no authority from the holder to receive payment.⁸ Even payment to the holder before maturity will not protect the maker if the instrument subsequently comes to the hands of a holder in due course.⁹ A multitude of authorities bring out the distinction between negotiable bills and notes and those not negotiable as to transfer free from equities. It is the negotiable instrument payable to bearer or indorsed in blank that the finder or thief can effectively transfer to the bona fide purchaser;¹⁰ the doctrine is not applicable to nonnegotiable bills and notes.¹¹ It is here that the law of bills and notes has gone far beyond the rules governing transfer of chattels, and it is not surprising to find the doctrine sharply limited. It is not even applicable to the transfer of those important instruments representing stock in a corporation, share certificates, which are

N. W. 572; *contra*, *Nelson v. Nelson Co.*, 31 Wash. 116, 71 Pac. 749. See also note 88. The term "negotiable instrument" in the statute is not confined to bills of exchange and promissory notes, but will be so used in this discussion.

⁶ 8 C. J. 52.

⁷ *Nielson v. Albert Lea*, 91 Minn. 388, 98 N. W. 195; *Van Keuren v. Corkins*, 66 N. Y. 77; NORTON ON BILLS AND NOTES, 4th ed., 17.

⁸ *City Bank v. Taylor*, 60 Iowa 66, 14 N. W. 128.

⁹ 2 DANIEL ON NEGOTIABLE INSTRUMENTS, 6th ed., 1391.

¹⁰ *Müller v. Race*, 1 Burr. 452; *Peacock v. Rhodes*, 2 Doug. 633.

¹¹ *Prather v. Weisiger*, 10 Bush (Ky.) 117; *Young v. Brewster*, 62 Mo. App. 628.

negotiable in the sense that they are fully assignable by indorsement and delivery. But title to such certificates, even though indorsed in blank, cannot be given by a thief to a bona fide purchaser.^{11a} It has been said not to apply to a transfer of an indorsed "negotiable" bill of lading, even under a statute making such bills "negotiable . . . in the same manner as bills of exchange and promissory notes".^{11b} While the holder in due course of a negotiable bill or note "holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves,"¹² the transferee of the nonnegotiable instrument stands in the position of an assignee, and takes subject to equities.¹³ While the transferee of the nonnegotiable paper can now generally sue in his own name in an action at law against the obligor, under statutes providing for suit in the name of the real party in interest,¹⁴ formerly his right at law was limited to a suit in the assignor's name.¹⁵ The rule holding a party liable when he negligently signs a promissory note in the belief that it is a document of a different character¹⁶ applies only when the instrument is negotiable,¹⁷ and whatever the liability of the indorser of the nonnegotiable bill or note may be, a question discussed below, he is not, by most authorities, entitled to the "demand and notice" necessary to hold the indorser of negotiable paper.¹⁸

But wide as their differences are, negotiable and nonnegotiable bills and notes have elements in common. The formal requisites for negotiable instruments are well known; they must be in writing, must be certain as to parties, time or maturity, amount, must con-

^{11a} MACHAN, MODERN LAW OF CORPORATIONS, §842.

^{11b} *Shaw v. North Pa. E. Co.*, 101 U. S. 557, 25 L. Ed. 892.

¹² N. I. L. §57.

¹³ *Franklin v. Twogood*, 18 Iowa 515; *Warren v. Scott*, 32 Iowa 22; *Shoe and Leather Nat. Bank v. Wood*, 142 Mass. 563, 8 N. E. 753; *Gilley v. Harrell*, 118 Tenn. 115, 101 S. W. 424. The assignment, as distinguished from indorsement, of a negotiable note, gives the assignee only such rights as he would have, had the instrument been non-negotiable. *Franklin v. Twogood*, *supra*.

¹⁴ Code §3459.

¹⁵ *Franklin v. Twogood*, 18 Iowa 515; 8 C. J. 52.

¹⁶ *Douglass v. Matting*, 29 Iowa 498; *Green v. Wilkie*, 98 Iowa 74, 66 N. W. 1046.

¹⁷ DANIEL ON NEGOTIABLE INSTRUMENTS, 6th ed., 1022 note. Of the cases cited, only *Kastner v. Pibilinski*, 96 Ind. 229, is in point.

¹⁸ *Herrick v. Edwards*, 106 Mo. App. 633, 81 S. W. 466. *Contra*, *Mehlberg v. Tisher*, 24 Wis. 607. See authorities cited *infra*.

tain an unqualified order or promise to pay in money.¹⁹ To be negotiable the instrument "must be payable to order or to bearer",²⁰ and this obviously will not be required in a nonnegotiable instrument. It is believed, however, that the other formal requisites established for negotiable bills and notes apply to those which are not negotiable, and that if they are not complied with the paper is not a bill or note at all, but a mere promise in writing. This is somewhat difficult to prove, for whether the point up for decision is the right of a holder to sue in his own name, as in some earlier cases,²¹ or, more commonly, the holder's power to enforce payment of the instrument free from some equitable defense the maker might have against the payee, all the court needs to decide is whether the instrument is negotiable. A statement that this or that clause in it, "rendered the instrument nonnegotiable" settles the rights of the parties, and it is unnecessary to go further and decide whether the paper dealt with was a bill or note or mere written agreement.

That the inquiry goes further than the question of negotiability alone has been recognized by careful judges. In dealing with an instrument containing a provision for payment "with New York exchange", Mr. Justice Mitchell says:²²

"Daniel, Randolph and Tiedeman state in general that such a provision does not affect the commercial or negotiable character of the paper, . . . and all of them treat of the question as if it only went to the negotiability of the instruments, whereas the real question lies back of that, and is whether they are promissory notes or bills of exchange at all."

Chief Justice Cooley uses language to the same effect where the instrument in question was uncertain in amount:²³

"The instrument is not, under the authorities in this State, nor under the elementary authorities, a promissory note, either negotiable or nonnegotiable, and is not therefore subject to the rules governing commercial paper. It lacks the required elements of certainty in time and amount of payment. . . . The so-called note being no more than a simple contract, not a note, . . . could only be transferred by assignment. . . ."

¹⁹ See §§1 to 10 of the N. I. L.

²⁰ N. I. L. §1 clause 4, §8, §9. The English Bills of Exchange Act does not require the word "order" if the instrument does not contain words showing an intention that it should not be transferable. B. E. A. §8.

²¹ *Coolidge v. Buggles*, 15 Mass. 386.

²² *Hastings v. Thompson*, 54 Minn. 184, 186, 55 N. W. 968.

²³ *Story v. Lamb*, 52 Mich. 525, 18 N. W. 248.

Likewise Shaw, C. J., applies the formal requirements to a non-negotiable bill:²⁴

"It is not payable to the order of the payee, but that is not essential to make it a bill of exchange. . . . The parties are all specially named, the drawer, the drawee, and the payee. The draft is payable at a time fixed, to-wit, on demand; on no contingency or condition, but absolutely, for a sum certain, out of no special fund, but by the drawee generally."

The Supreme Court of Maine has handled the point the same way.²⁵

That the formal requisites are applicable to nonnegotiable as well as to negotiable bills and notes may be proved by the decisions in many cases, even where the language of the court does not expressly say so. If an order is drawn on a particular fund, consideration is not presumed.²⁶ Authorities are cited below to show that even without the aid of a statute there is a presumption of consideration in a nonnegotiable bill. This alone would establish the point. If the instrument is payable from a particular fund, it is no bill of exchange and no promise is raised by the law in favor of the payee against the drawer from the failure of the drawee to accept or pay.²⁷ But the drawer of a nonnegotiable bill, it has been held, who has taken up the instrument upon the acceptor's failure to pay may sue the acceptor in his own name without indorsement or assignment by the payee.²⁸

If it can be taken as established that there is a difference between nonnegotiable bills and notes on the one hand, and ordinary written contracts on the other, we can now point out the places where the rules governing ordinary contracts are not applicable to the former class of instruments. First, as to a presumption of consideration. CORPUS JURIS says that while a consideration for a negotiable instrument is presumed, the consideration of a non-negotiable instrument must ordinarily be proved.²⁹ This statement is incorrect and is not borne out by the cases. It seems to be held without disagreement that a nonnegotiable bill of exchange imports

²⁴ *Wells v. Brigham*, 6 Cush. (Mass.) 6, 52 Am. Dec. 750.

²⁵ *Kendall v. Galvin*, 15 Me. 131.

²⁶ *Nat. Sav. Bank v. Cable*, 73 Conn. 568, 48 Atl. 428; *Conroy v. Ferree*, 68 Minn. 325, 71 N. W. 383; *Sidle v. Anderson*, 45 Pa. St. 464; *Josselyn v. Lacier*, 10 Mod. 294, 88 Reprint. 734. Cf. *Wingo v. McDowell*, 8 Rich. Law (S. C.) 446, no presumption of consideration in promise to deliver property.

²⁷ *Averett v. Booker*, 15 Gratt. (Va.) 163, 76 Am. Dec. 203.

²⁸ *Coursin v. Ledlie*, 31 Pa. St. 506.

²⁹ 8 C. J. 52.

a consideration.³⁰ As to notes, there is a difference of opinion. What seems the clear weight of authority, numerically at any rate, holds there is, *prima facie*, a presumption of consideration in case of a nonnegotiable note.³¹ Here it is necessary to distinguish carefully the cases under statutes similar to the Iowa Code provision discussed below, extending a presumption of consideration to other writings than those meeting the requirements for bills and notes.³² Not a few decisions will be found, however, stating that consideration for a nonnegotiable note must be alleged and proved,³³ though it is often stated that if the words, "value received" or its equivalent appear, consideration is presumed,³⁴ because admitted by the maker.³⁵

The correct view of the matter on principle will depend upon whether or not the nonnegotiable bill or note is a mercantile instrument. Logically there should be no inquiry at all into the question of consideration in this latter class of obligations. The common

³⁰ *Louisville etc. Ry. Co. v. Caldwell*, 98 Ind. 245; *Coursin v. Ledlie*, 31 Pa. St. 506; *Arnold v. Sprague*, 34 Vt. 402; *Averett v. Booker*, 15 Gratt. (Va.) 163, 76 Am. Dec. 203.

³¹ *Pyle v. Gallaher*, 22 Del. 407, 67 Atl. 197; *Mitchell v. Rome E. Co.*, 17 Ga. 574; *Caples v. Branham*, 20 Mo. 244, 64 Am. Dec. 183; *Lowrey v. Danforth*, 95 Mo. App. 441, 69 S. W. 39; *Dugen v. Campbell*, 1 Ohio 115.

³² *Stewart v. Street*, 10 Cal. 372; *Rogers v. Schulenberg*, 111 Cal. 281, 43 Pac. 899; *Cowan v. Hallack*, 9 Colo. 572, 13 Pac. 700; *Durland v. Pitcairn*, 51 Ind. 426; *Carnwright v. Gray*, 127 N. Y. 92, 27 N. E. 835; *F. N. Bank v. Spear*, 12 S. D. 108, 80 N. W. 166.

³³ *Bourne v. Ward*, 51 Me. 191; *Stronach v. Bledsoe*, 85 N. C. 473; *Deyo v. Thompson*, 53 App. Div. 9, 65 N. Y. Supp. 459; *Kinsella v. Lockwood*, 79 Misc. 619, 140 N. Y. Supp. 513; *Richards v. Levison*, 142 N. Y. Supp. 272.

The change in the view of the New York cases came through the Negotiable Instruments Law. *Carnwright v. Gray* was based upon a statute, a virtual enactment of the Statute of Anne, giving negotiability to promissory notes. This statute was repealed when the N. I. L. was passed. If promissory notes really depended for validity upon the Statute of Anne or similar statutes in this country, the conclusion of the court would necessarily follow. It has been often demonstrated, however, that the statute was merely declaratory, and was made necessary by the obstinacy of Lord Holt in refusing to recognize promissory notes as mercantile instruments. See Cranch, "Promissory Notes before the Time of Lord Holt," 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY.

³⁴ *Bristol v. Warner*, 19 Conn. 7; *Hoyt v. Jaffray*, 29 Ill. 104; *Bourne v. Ward*, 51 Me. 191; *Stronach v. Bledsoe*, 85 N. C. 473, *semble*.

³⁵ *Hill v. Todd*, 29 Ill. 101; *Conrad Seipp Brew. Co. v. McKittrick*, 86 Mich. 191, 48 N. W. 1086; *Owens v. Blackburn*, 161 App. Div. 827, 830, 146 N. Y. Supp. 969.

law doctrines of consideration were established in the 16th Century,³⁶ but the enforcement of causes arising under the law merchant was not undertaken by the common law courts until the latter part of the 17th Century.³⁷ The law merchant set no store on consideration, and the courts of the common law forced this doctrine on the custom of merchants.³⁸ The best the common law could do for these mercantile instruments was to make a presumption of consideration, conclusive as to a holder in due course of negotiable paper, but subject to showing lack of consideration as a defense if the contest was between the party sought to be charged and anyone not a holder in due course. The uniform statute so provides.³⁹ If nonnegotiable bills and notes are mercantile instruments they ought to have the benefit of this presumption. The cases cited earlier in this discussion that a bill or note need not be negotiable would be authority that nonnegotiable instruments belong to this class. Earlier authority, while not conclusive, gives support to this view.⁴⁰ If these are not mercantile instruments no reason appears why they should be distinguished from other written contracts.

IOWA STATUTES ON CONSIDERATION

The question of presumption of consideration, not only in bills and notes, but in all written contracts has been for many years settled in Iowa by statutory enactment. Sections 3069 and 3070 of the Code provide:

³⁶ AMES, LECTURES ON LEGAL HISTORY, Ch. 13.

³⁷ 1 HOLDSWORTH, HISTORY OF ENGLISH LAW, 333, 334.

³⁸ See "Early History of the Law Merchant in England" by A. T. Carter, 17 Law Quart. Rev. 232, 242. Dean Ames believed that a bill or note required no consideration. He has stated it thus: "This notion (that as between the immediate parties consideration is necessary to the obligation of a bill or note) . . . is erroneous on principle, and also upon the authorities; for although it must be conceded that the courts have sanctioned the defense of absence of consideration in certain cases, these decisions should be regarded as anomalous exceptions to the rule that a bill, being in the nature of a specialty, is obligatory without consideration, rather than as illustrations of the opposite doctrine, that a bill, being a simple contract, requires a consideration to support it." He then cites instances in which bills and notes are treated as specialties. 2 Ames Cas. on Bills and Notes 876-878. See, however, Prof. Holdsworth in 32 L. Quart. Rev. on p. 29.

³⁹ N. I. L. §§24, 28. See 17 Columbia Law Rev. 717 as to burden of proof of lack of consideration.

⁴⁰ These will be found collected in a scholarly note in the fourth edition of NORTON ON BILLS AND NOTES, pp. 10, 11 and 12.

"All contracts in writing, signed by the party to be bound or by his authorized agent or attorney, shall import a consideration.

"The want or failure, in whole or in part, of the consideration of a written contract may be shown as a defense, total or partial, except to negotiable paper transferred in good faith and for a valuable consideration before maturity, but if such paper has been procured by fraud upon the maker, no holder thereof shall recover thereon of the maker a greater sum than he paid therefor, with interest and costs."⁴¹

Under this provision consideration is implied in all written contracts,⁴² and lack of an allegation of consideration does not make the petition demurrable.⁴³

The words of the statute are that want of consideration may be shown as a defense. The defendant must, then, set it up as a defense and prove it⁴⁴ and if no evidence on the point is given, the plaintiff recovers.⁴⁵ If really a matter of defense, the burden on

⁴¹ The last part of §3070, which changed the rule of recovery as laid down in *Lay v. Wissman*, 36 Iowa 305, is inconsistent with §57 of the N. I. L. which provides that a holder in due course "may enforce payment for the full amount thereof against all parties liable thereon", and must be taken to be superseded by that act.

The change in phraseology in the sections cited is interesting. By the Code of 1851, §974, private seals were abolished. §975 provided that: "All contracts in writing . . . signed by the party to be bound . . . shall import a consideration in the same manner as sealed instruments now do." By §976, "The want or the failure, in the whole or in part, of the consideration of a written contract may be shown as a defense, total or partial as the case may be, in an action on such contract brought by one who is not an innocent or bona fide holder."

Section 975 could not be followed literally, for if the written contract imported a consideration as a sealed instrument there would be no room for the application of §976. See, however, *Heacock v. Heacock*, 108 Iowa 540, 79 N. W. 353, where it is said that "this statute was enacted for the purpose of giving to instruments in writing the same effect as instruments under seal had at common law." The latter section, too, is not limited in terms to the holder of a negotiable instrument.

In §§2113 and 2114 of the Code of 1873, the language is that of the Code of 1897, except for the last part of §3070, now repealed by the Negotiable Instruments Law.

⁴² *Sabin v. Harris*, 12 Iowa 87; *Arnold Bros. v. Kreutzer*, 67 Iowa 214, 25 N. W. 138; *Gafford v. Amer. Mtge. & Inv. Co.*, 77 Iowa 736, 742, 42 N. W. 550; *Brockway v. Harrington*, 82 Iowa 23, 47 N. W. 1013; *French v. French*, 91 Iowa 140, 59 N. W. 21; *Heacock v. Heacock*, 108 Iowa 540, 79 N. W. 353.

⁴³ *Linder v. Lake*, 6 Iowa 164; *Towsley v. Olds*, 6 Iowa 526; *Peddicord v. Whittam*, 9 Iowa 471; *Goodpaster v. Porter*, 11 Iowa 161; *Henderson v. Booth*, 11 Iowa 212; *State v. Wright*, 37 Iowa 522.

⁴⁴ *Gafford v. Amer. Mtge. & Inv. Co.*, 77 Iowa 736, 742, 42 N. W. 550.

⁴⁵ *McCormick Machine Co. v. Jacobson*, 77 Iowa 582, 42 N. W. 499.

this issue should be on the defendant to establish the failure or lack of consideration, not on the plaintiff to establish it as part of his case, even where the defendant has offered some evidence to show the want of consideration, though the plaintiff would then have the burden of going forward with opposing evidence. If the proof on the point of consideration hung in even balance, the plaintiff should prevail, if lack of consideration is indeed a matter of defense. The point has come up under Sections 24 and 28 of the Negotiable Instruments Law which provides that "every negotiable instrument is deemed prima facie to have been issued for a valuable consideration," and that "absence or failure of consideration is matter of defense as against any person not a holder in due course". Some of the cases, decided where the statute is in force, have been sharply criticized for saying that the burden rested on the plaintiff to show consideration by a preponderance of the evidence.⁴⁶ Iowa cases have said generally that the burden of showing lack of consideration, under this Code section set out above, is on the defendant.⁴⁷ "The effect of these two sections, as heretofore interpreted, has been to put the burden upon defendant of both pleading and proving a want of or failure of consideration for a written contract."⁴⁸ We may expect this sound position to be taken on the Negotiable Instruments Law also.

The existence of consideration for a sealed instrument may be inquired into under the code provision, though the court erred in allowing the inquiry upon a sealed instrument executed where the common law doctrine of seals was in force, and sued upon in this State.⁴⁹ A release given by a creditor to a debtor from further liability upon an undisputed liquidated claim, upon part payment of the claim, will not bar subsequent action by the creditor.⁵⁰ The

⁴⁶ See BRANNON'S NEGOTIABLE INSTRUMENTS LAW, 2nd ed., p. 31, for cases and criticism.

⁴⁷ *Univ. of Des Moines v. Livingston*, 57 Iowa 307, 10 N. W. 738; *McCormick Machine Co. v. Jacobson*, 77 Iowa 582, 42 N. W. 499; *Gafford v. Amer. Mtge. & Inv. Co.*, 77 Iowa 736, 42 N. W. 550. See *Osgood v. Bringolf*, 32 Iowa 265; *Briggs v. Downing*, 48 Iowa 550; *Oakland Cemetery v. Lakins*, 126 Iowa 121, 101 N. W. 778.

⁴⁸ Deemer, J., in *Gould v. Gunn*, 161 Iowa 155, 161, 140 N. W. 380.

⁴⁹ *Williams v. Haines*, 27 Iowa 251.

⁵⁰ *Bender v. Been*, 78 Iowa 283, 43 N. W. 216. The language used by the learned judge cannot be supported. He said: "It is not and cannot be claimed that a sealed instrument imports a valid consideration when it shows, by its own conditions and recitations, that it is in fact not founded upon a consider-

result follows logically from the statute and the orthodox rule as to consideration in such a case, but is an extremely inconvenient one in every day operation. Such payment and release ought to be effective and would be if given under seal in a state where seals were still given their common law effect. The sealed instrument being ineffective, the Iowa debtor must keep on hand the legendary hawk, robe, or beaver hat to furnish the creditor, in addition to the part payment, if he is to escape subsequent suit.

So far as the Iowa law is concerned, then, all written contracts whether sealed instruments, nonnegotiable bills and notes, or ordinary agreements in writing, stand on the same footing as to presumption of consideration, and want or failure thereof as a defense; (1) that consideration is necessary, but (2) that the burden is on the defendant of pleading and proving either the lack or failure of it. The same is true of negotiable paper except as to a holder in due course or some one who traces title through such holder, in which case the presumption of consideration is conclusive.

PRESUMPTION OF GENUINENESS

Another statutory provision, important when a bill or note is sued upon, is found in §3640 of the Code. It provides:

"When a written instrument is referred to in a pleading, and the same or a copy thereof is incorporated in or attached to such pleading, the signature thereto, and to any indorsement thereon, shall be deemed genuine and admitted, unless the person whose signature the same purports to be shall, in a pleading or writing filed within the time allowed for pleading, deny under oath the genuineness of such signature. If such instrument is not negotiable, and purports to be executed by a person not a party to the proceedings, the signature thereto shall not be deemed genuine or admitted, if a party to the proceeding, in the manner and within the time before mentioned, states under oath that he has no knowledge or information sufficient to enable him to form a belief as to the genuineness of such signature. The person whose signature purports to be signed to such instrument shall, on demand, be entitled to an inspection thereof."

The language of this section is very broad. It has been applied to an indorser's signature on a promissory note,⁵¹ to a check,⁵² to non-

ation." Suppose a sealed instrument at common law stated expressly that the promise contained in it was made without consideration. Could it not be sued on? That it could certainly was the common law doctrine. See, Deemer, J., in *Ryan v. Becker*, 136 Iowa 273; also James Barr Ames in 9 Harv. L. Rev. 49, on 52.

⁵¹ *Partridge v. Patterson*, 6 Iowa 514.

⁵² *Shaw v. Jacobs*, 89 Iowa 713, 55 N. W. 333, 56 N. W. 684.

negotiable city and county warrants,⁵³ to an assignment of a judgment,⁵⁴ to a corporate deed.⁵⁵ Here, again, there is no significance in the fact that the instrument is a bill or note.

The statute does not make the lack of genuineness of a signature an affirmative defense, but simply for the sake of convenience relieves the plaintiff of proving what in most cases will be the fact, that the signature on a written instrument is that of whom it purports to be. Once the genuineness is denied under oath, as provided by the statute, the plaintiff must show it,⁵⁶ and cannot introduce the instrument in evidence without proof of the signature.⁵⁷ Of course if the defendant then offers no evidence to rebut the prima facie case established, the plaintiff will win,⁵⁸ but the burden of the whole case, establishing the genuineness and execution of the instrument, is upon the plaintiff.⁵⁹ When the court says that "The object of the statute was to change the burden of proof in respect to the execution of written instruments sued on, from the plaintiff, as it was by the common law, and cast it upon the defendant . . . ,"⁶⁰ it is referring to the burden of going forward with the evidence, and not to the burden of proof to establish the fact of genuineness.⁶¹ An answer denying the execution of the instrument, not sworn to, is sufficient to allow the defendant to offer proof that the signature is not genuine.⁶² When the claim is against an estate, however, based on a note claimed to have been executed by a decedent, the provision does not apply. "The dead

⁵³ *Clark v. Des Moines*, 19 Iowa 199, 227; *Clark v. Polk County*, 19 Iowa 248.

⁵⁴ *Edmonds v. Montgomery*, 1 Iowa 143. These early cases are indicative of the long standing nature of such legislation in this State. See p. 455 of the Statutes of 1843.

⁵⁵ *Blackshire v. Iowa Homestead Co.*, 39 Iowa 624.

⁵⁶ *Müller v. House*, 67 Iowa 737, 25 N. W. 899; *Carthage Bank v. Butterbaugh*, 116 Iowa 657, 88 N. W. 954; *Damman v. Vollenweider*, 126 Iowa 327, 101 N. W. 1130; *Doty v. Braska*, 151 Iowa 23, 126 N. W. 1108.

⁵⁷ *Müller v. House*, *supra*.

⁵⁸ *Schulte v. Coulthurst*, 94 Iowa 418, 62 N. W. 770.

⁵⁹ *Farmers and Merchants Bank v. Young*, 36 Iowa 44.

⁶⁰ *Sankey v. Trump*, 35 Iowa 267. See also *Brayley v. Hedges*, 52 Iowa 623, 3 N. W. 652.

⁶¹ See on the use of the phrase "burden of proof", in the two senses, J. B. THAYER, PRELIMINARY TREATISE ON EVIDENCE, Chapter IX.

⁶² *Brayley v. Hedges*, *supra*; *Currier v. Clark*, 145 Iowa 613, 619, 124 N. W. 622.

can neither affirm or deny", and the law imposes a statutory denial without pleading on behalf of the estate.⁶³

RIGHTS AND LIABILITIES UPON TRANSFER

It was said above that what is now the most important characteristic of negotiable bills and notes, their negotiability, giving the holder in due course the power of enforcing the obligation free from the defenses of prior parties among themselves, does not apply to paper not containing words of negotiability. Nonnegotiable paper is like the ordinary written contract in this; it can only be transferred by assignment and subject to prior equities. The question then becomes, is the liability of the transferor of a nonnegotiable bill or note, assuming the transfer to be in such form that it would be a true indorsement were the paper negotiable, greater than or different from that of the mere assignor of a chose in action?

Such assignor has liabilities of considerable importance.⁶⁴ In general it may be said that by assignment, when made for consideration, he loses all right of control over the chose, he has no right to collect or compromise, and if he does collect, the money in his hands will be held in trust for the assignee.⁶⁵

The obligations are not merely negative, however. If there are express warranties upon assignment, liability of course follows according to their terms.⁶⁶ Otherwise the liability, assuming the assignment is made upon a consideration, is said to be that of the seller of any other property.⁶⁷ The assignor impliedly warrants

⁶³ *In re Estate of Chismore*, 166 Iowa 217, 147 N. W. 297. See also *Elliott v. Capitol City Bank*, 149 Iowa 309, 128 N. W. 369; *Smith v. King*, 88 Iowa 105, 55 N. W. 88; *Ashworth v. Grubbs*, 47 Iowa 353.

⁶⁴ The liabilities of an assignor of a negotiable instrument who transfers by delivery, this constituting an assignment (2 Ames Cas. on Bills and Notes 880), have been codified by §65 of the N. I. L. Such person warrants:

- (1) That the instrument is genuine and in all respects what it purports to be;
- (2) That he has a good title to it;
- (3) That all prior parties had capacity to contract;
- (4) That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

See Ann. Cas. 1912 A, 923 *et seq.*, for liability of assignment without recourse. The note includes cases of indorsement as well as assignment without recourse.

⁶⁵ 5 C. J. 966.

⁶⁶ *Taylor v. Curtis*, 3 Martin N. S. (La.) 132; *Lewis v. Hoblitzell*, 6 G. & J. (Md.) 259; *Stout v. Stevenson*, 4 N. J. L. 202, 206.

⁶⁷ *Stout v. Stevenson*, *supra*.

that he has title to the chose,⁶⁸ just as though the subject of the sale was a tangible chattel. He also warrants that the chose is genuine, a valid obligation, as it purports to be,⁶⁹ or, as the Iowa court puts it, "that it is of the kind and description it purports to be on its face".⁷⁰

Good authority limits the liability to this. The assignor does not in the absence of express agreement, become a warrantor of, or a surety for, the performance by the obligor.⁷¹ The "implied warranty is limited to the validity of the contract or chose in action sold. . . . [It] does not include the pecuniary responsibility of the parties to the contract or their ability to discharge its obligations."⁷²

It must be admitted that authority exists for imposing further liability on the assignor. Early decisions in several jurisdictions, among which Kentucky cases are the most numerous, hold that where the assignment is for full value, and where the assignee, using due diligence, has exhausted all remedies against the debtor and had not been able to recover, he may get back his consideration from the assignor.⁷³

It need hardly be said that the liability of the first assignor is

⁶⁸ WILLISTON ON SALES, §218. See also authorities in next note.

⁶⁹ *Haser v. Yost*, 54 Ark. 485, 16 S. W. 372; *Emmerson v. Claywell*, 14 B. Mon. (Ky.) 18, 58 Am. Dec. 645; *Miners Bank v. Burress*, 164 Mo. App. 690, 147 S. W. 1110; *Flynn v. Allen*, 57 Pa. St. 482; *Giblin v. North Wis. Lbr. Co.*, 131 Wis. 261, 111 N. W. 499; 15 AMER. AND ENG. ENCYC. LAW, 2nd ed., 1240; 5 C. J., 968 and cases cited; 2 R. C. L. 626, 627.

⁷⁰ *Waller v. Staples*, 107 Iowa 738, 77 N. W. 570.

⁷¹ *Haser v. Yost*, *supra*; *Garrettsie v. Van Ness*, 2 N. J. L. 17; 5 C. J. 969 and cases cited; 15 A. AND E. ENCYC. LAW, 2nd ed., 1240.

⁷² *Giffert v. West*, 33 Wis. 617, 625.

⁷³ The cases may be found in 5 C. J. 969. Chief Justice Bibb in a Kentucky case in 1809, (*Smallwood v. Woods*, 1 Bibb 542) says that as an original question, there would be great difficulty in making out the liability. He says that the doctrine in Kentucky was rested on a Virginia decision, the first one under the statute like that of Kentucky, and that having become settled, it was too late to overturn it; possibly the maxim *communis error facit jus* should apply. The Virginia case was *Mackie v. Davis*, 1796, 2 Wash. 219. A statute in Virginia had made bonds and notes of hand assignable. The court in that case, however, considered the assignee's right to be bottomed on common law, not derived from the statute. Many of the cases merely recognize the rule and discuss due diligence, which was pretty strictly interpreted. *Bedal v. Stith*, 3 T. B. Mon. 290; *Doughtery v. Maple*, 4 Bibb 557; *Spratt v. McKinney*, 1 Bibb 595; *Payne v. Huffman*, 98 Va. 372, 36 S. E. 476. In others, it is possible that a negotiable note was involved. *Levi v. Evans*, 7 B. Mon. 115; *Harnett v. McGarvy*, 4 B. Mon. 393; *McFadden v. Finnell*, 3 B. Mon. 121.

not like that of an indorser, which is transferred to subsequent indorsers and allows the holder to sue any prior indorser in his own name. Kentucky has said that a remote indorsee can go against the original assignor in equity or at law in the first assignee's name,⁷⁴ and West Virginia, while saying that the warranty of a chose in action would give no right to a remote assignee at common law, states that he may sue under the statutory provision there.⁷⁵ Where chattels are resold by a purchaser to another, the resale without more, does not give the subpurchaser a right to sue the original seller for breach of warranty. This is said to be upon two grounds; first, that the sale of the chattel does not indicate that the seller wishes to part with his right of action; second, the warranty is a contract of personal indemnity, and cannot be enlarged to include indemnification of the subpurchaser for loss he suffers from its breach.⁷⁶ Would not this same reasoning be applicable to the liability of the remote assignee where a chose in action is re-assigned? There is certainly not much authority that it would not.⁷⁷

It seems fair to say that apart from liability on a warranty of title and genuineness, liability of an assignor of a chose in action is exceptional. Will one who assigns by "indorsement" a non-negotiable bill or note incur greater or different liability? The term indorsement is not in strictness applicable to such a transaction, for used as a term of art it should apply only to transfer, in a particular way, of negotiable paper. It is commonly used, however, when one writes his name on the back of a nonnegotiable bill or note, and will so be used for convenience here. Courts in several jurisdictions have ruled that such indorser is a mere assignor and incurs no additional liability upon indorsement.⁷⁸ It should be noted that in some of the cases so holding the provisions of the contract were such as to take it out of the class of bills and

⁷⁴ *McFadden v. Finnell*, *supra*; *Mardis v. Tyler*, 10 B. Mon. 376.

⁷⁵ *Trustees v. Siers*, 68 W. Va. 125, 69 S. E. 468.

⁷⁶ WILLISTON ON SALES, §244.

⁷⁷ CORPUS JURIS only cites the West Virginia case of *Trustees v. Siers*, *supra*, 5 C. J. 976.

⁷⁸ *Exchange Bank v. Chapline*, (Ark.), 158 S. W. 151; *South Bend Iron Works v. Paddock*, 37 Kan. 510, 15 Pac. 574; *Barger v. Farnham*, 130 Mich. 487, 90 N. W. 281; *Davis v. McCall*, 179 Mo. App. 198, 166 S. W. 1113; *Barry v. Wachosky*, 57 Neb. 534, 77 N. W. 1080; *Mackintosh v. Gibbs*, 81 N. J. L. 577, 80 Atl. 554; *McEwen v. Black*, 44 Okla. 664, 146 Pac. 37; and see collection of cases 8 C. J. 57, and Ann. Cas. 1912 B 706.

notes altogether.⁷⁹ Such a rule does not bear on the question of whether or not nonnegotiable notes and bills are mercantile specialties. If they are so considered, no one would claim that they can be transferred as negotiable paper is, and the rights and liabilities arising upon transfer might well differ.

In jurisdictions where the indorser of a nonnegotiable bill or note is made liable by the indorsement, there are at least three theories governing the liability. That laid down by Judge Story,⁸⁰ and approved by some courts,⁸¹ is that every indorsement operates in legal contemplation as the drawing of a bill of exchange by the indorser in favor of his immediate indorsee. It may be treated as an authority given the indorsee to receive the money due, and that it will be paid upon due presentment. Notice of dishonor would be necessary to make the indorser liable. This seems a very labored explanation for an indorser's liability.

Other cases hold such indorser as a maker or guarantor, and still others, as a surety who must pay if by due diligence the instrument cannot be collected from the maker.⁸² It is interesting to note that at least one of the jurisdictions holding to the last theory imposes the same liability upon the assignor of any chose in action.⁸³

IOWA DECISIONS AND STATUTES

In a series of decisions beginning at a very early volume in the State reports, Iowa cases have recognized and enforced a liability upon the indorser of a nonnegotiable bill or note.⁸⁴ The first case to pass upon the point was *Wilson v. Ralph*, in 1856, where the indorsers were held, and demand of the maker and notice of non-payment to indorsers were said to be unnecessary. This and fol-

⁷⁹ *Exchange Bank v. Chapline*, *supra*; *Kendall v. Parker*, 103 Cal. 319, 37 Pac. 401; *Carleton v. Brooks*, 14 N. H. 149; *McEwen v. Black*, *supra*.

⁸⁰ STORY ON PROMISSORY NOTES, §§128, 129.

⁸¹ *Helter v. Alden*, 3 Minn. 332; *Hart v. Eastman*, 7 Minn. 74.

⁸² Cases holding the indorser on these theories are collected in 8 C. J. 57, 58, and Ann. Cas. 1912 B, 707, 708. See especially, *Cromwell v. Hewitt*, 40 N. Y. 491, and the reporter's note following the decision.

⁸³ See, for instance, *Wettlauser v. Baxter*, 137 Ky. 362, 125 S. W. 741, and *Dotson v. Owsley*, 141 Ky. 452, 132 S. W. 1037.

⁸⁴ *Wilson v. Ralph*, 3 Iowa 450; *Long v. Smyser*, 3 Iowa 265; *Hall v. Monohan*, 6 Iowa 216; *Peddicord v. Whittam*, 9 Iowa 471; *Peck v. Frink*, 10 Iowa 193; *Billingham v. Bryan*, 10 Iowa 317; *Huse v. Hamblin*, 29 Iowa 501; *Park v. Best*, 176 Iowa 7, 157 N. W. 233. See *Allison v. Hollembeak*, 138 Iowa 479, 114 N. W. 1059.

lowing Iowa cases refer back to the opinion of Sutherland, J., in the New York case of *Seymour v. Van Slyck*,⁸⁵ where the liability is stated as follows:

"The endorsement in such a case is equivalent to the making of a new note; it is a guaranty that the note will be paid—it is a direct and positive undertaking, on the part of the endorser, to pay the note to the endorsee, and not a conditional one to pay if the maker does not, upon demand, after due notice. . . . The endorser in such a case . . . stands in the relation of principal and not surety to his endorsee, and has no right to insist upon a previous demand of the maker and notice of non-payment. An absolute guaranty may be written over his endorsement, upon which a recovery may be had against him."

The chief point considered in *Wilson v. Ralph* was not the general question of the indorser's liability, which was provided for by statute, but whether he was entitled to have a demand made upon the maker before the indorser could be held, a question decided in the negative.

The statute which made the indorser liable is important enough to trace its history before and since 1856. It has long been a part of the statutory law of Iowa, for the first legislature of Iowa Territory at Burlington, 1838–1839, treated the subject in the chapter on "Promissory Notes". Section One of this important chapter put promissory notes, bonds, due bills, "and other instruments in writing" to pay money, or personal property, or to pay money in personal property, in one class, no mention being made of words of negotiability, and made them all assignable in the same manner as bills of exchange, by endorsement by the promisee or his assignee. Section Two made the assignor liable to the action of the assignee, "if such assignee shall have used due diligence by the institution and prosecution of a suit against the maker" with a proviso for liability without such action if the defendant therein was out of the jurisdiction or if the suit would have been unavailing. The other parts of the chapter are interesting but not in point here. These provisions were substantially reenacted in Chapter 106 of the Revised Statutes of 1843. Chapter 58 of the Code of 1851 distinguished negotiable and nonnegotiable instruments, but by §949 made bonds, due bills, and all instruments in which the maker promises to pay money, or money in property or labor, or to pay or deliver property or labor, assignable, subject to the maker's defenses before notice of assignment. Such instruments may be

⁸⁵ 8 Wendell 403, 421.

"negotiable" if the intent appears. Section 956 says: "The assignor of any of the above instruments not negotiable shall be liable to the action of his assignee without notice." These provisions remain unchanged in the Revision of 1860, Chapter 73, and the Code of 1873, Chapter 3, §§2082-2088, has similar rules. These are likewise carried down to the Code of 1897. Several sections of Chapter 3 "Of Notes and Bills" were repealed when Iowa adopted the Negotiable Instruments Law, but the sections relating to the assignability of nonnegotiable paper were not expressly included in the repealing clause,⁸⁶ and since the act does not concern paper which is not negotiable, there is no reason for saying that they are repealed by implication. The sections as they now stand, which are in point here, read as follows:

§3044. "ASSIGNMENT OF NON-NEGOTIABLE INSTRUMENTS. Bonds, due bills, and all instruments by which the maker promises to pay another, without words of negotiability, a sum of money, or by which he promises to pay a sum of money in property or labor, or to pay or deliver any property or labor, or acknowledges any money, labor or property to be due, are assignable by indorsement thereon, or by other writing, and the assignee shall have a right of action thereon in his own name, subject to any defense or counter-claim which the maker or debtor had against any assignor thereof before notice of such assignment."

§3046. "WHEN ASSIGNMENT PROHIBITED. When by the terms of an instrument its assignment is prohibited, an assignment thereof shall nevertheless be valid, but the maker may avail himself of any defense or counter-claim against the assignee which he may have against any assignor thereof before notice of such assignment is given to him in writing."

§3048. "ASSIGNOR LIABLE. The assignor of any of the above instruments not negotiable shall be liable to the action of his assignee without notice."

The liability imposed by the broad language of the statutes explains the result of several of the Iowa cases that would be hard otherwise to justify. In Minnesota, where the indorser of a non-negotiable note becomes liable upon his indorsement, it has been held that the indorser of an instrument in form like a promissory note but in which the amount to be paid was uncertain, did not become liable.^{86a} This is correct, if there is any such thing as a nonnegotiable note as distinguished from any other written contract. In these Iowa decisions the person writing his name on the back of an instrument payable in current funds or currency (in Iowa not regarded as calling for payment in money) has been held as if the instrument met the technical requirements of a promissory

⁸⁶ §3060a of Code Supplement.

^{86a} *Smith v. First State Bank*, 95 Minn. 496, 104 N. W. 369.

note.⁸⁷ This result is entirely correct under the statute, for its extensive provisions make it unnecessary to inquire whether the instrument is a true promissory note or not. The same would be true of an instrument made payable out of a particular fund,⁸⁸ or to pay in property,⁸⁹ or one payable on condition.⁹⁰

DEMAND AND NOTICE

On the theory that this "indorser's" liability is like that of a maker, he would not be entitled to have demand made on the principal obligor and notice to him as a condition of his liability. This is the view of the Iowa cases, already cited, and is clearly called for by the terms of the statute. The weight of authority is this way, though on the theory that the indorsement is comparable to the drawing of a bill, the drawer, being conditionally liable, would be entitled to have demand made and notice given him.⁹¹

RIGHTS OF REMOTE ASSIGNEE

Whether or not a remote assignee could hold a party indorsing a nonnegotiable instrument of the class the Code made assignable by indorsement was raised in the case of *Huse v. Hamblin*, in 1870.⁹² It was argued that §1803 of the Revision of 1860, by which the assignor was made liable to the action of the indorsee without notice, (which section is carried down in exactly the same language in the present Code) gave an action against the immediate assignor alone. This contention was rejected by the court. The holder, it was held, could sue any assignor, and the decision has been followed.⁹³ Even without the statute the result is not a difficult one to reach. If the original indorsement made the party so indorsing liable, a subsequent transfer should be taken to assign this liability as well as that

⁸⁷ *Long v. Smyser*, 3 Iowa 265; *Huse v. Hamblin*, 29 Iowa 501; *Park v. Best*, 176 Iowa 7, 157 N. W. 233.

⁸⁸ *Allison v. Hollembeak*, 138 Iowa 480, 114 N. W. 1059. In such a case the liability of the indorser is only in accordance with the terms of the instrument indorsed. The court in this case intimated that the Negotiable Instruments Law fixed the liability. This is erroneous, as the act does not apply to instruments not negotiable. *Dille v. White*, 132 Iowa 327, 347, and see cases cited in note 5 *supra*.

⁸⁹ *Peddicord v. Whittam*, 9 Iowa 471. The court here expressly stated that the instrument was not technically a promissory note.

⁹⁰ *Lynch v. Mead*, 99 Iowa 66, 68 N. W. 579.

⁹¹ Authorities on both sides may be found in 8 C. J. 57, 58, and notes.

⁹² *Huse v. Hamblin*, 29 Iowa 501.

⁹³ *Lynch v. Mead*, *supra*.

of the maker, and the new holder could pursue maker or indorser in his transferor's name at law or in his own name in equity, or under the Codes in his own name at law. This is the view of Story.⁹⁴

ANOMALOUS INDORSER

The liability of the irregular or anomalous indorser of a non-negotiable bill or note presents a different question from that raised when the payee or subsequent holder indorses it. This anomalous indorser does not assign or transfer anything. His signature is placed on the instrument to give it additional credit. Is he to be taken to have done a vain thing? In an early Iowa case,⁹⁵ Hastings, C. J., says, *obiter*, that without proof of an undertaking to be responsible in some manner for good consideration, such an indorser incurs no liability. In the Code of 1851, the liability was fixed by statute. The sections covering it follow.

"§953. The blank indorsement of an instrument for the payment of money, property, or labor, by a person not a payee, indorser or assignee thereof, shall be deemed a guaranty of the performance of the contract.

"§954. To charge such guarantor notice of the payment by the principal must be given within a reasonable time, but the guarantor is chargeable without notice, if the holder show affirmatively that the guarantor has received no detriment from the want of notice.

"§955. An indorser of a negotiable instrument, and a guarantor as contemplated in the preceding section, is liable to the action of an indorsee, assignee, or payee, without notice if the indorsee, assignee, or payee have used due diligence in the institution and prosecution of a suit against the maker or his representative."

These statutes were carried through succeeding Codes,⁹⁶ and were combined in §3049 of the 1897 Code. But this section of fifty years standing in Iowa was expressly repealed by §3060a of the Supplement, when the Negotiable Instruments Law was enacted. That law makes the anomalous indorser of negotiable paper liable, with certain qualifications, as any other indorser,⁹⁷ but leaves the liability of one who thus indorses paper not negotiable unsettled.

⁹⁴ STORY ON PROMISSORY NOTES, §128. Cases cited in 8 C. J. 59, n. 96, for the opposite rule do not bear out the point for which they are cited. Indeed in one of them, *Kendall v. Parker*, 103 Cal. 319, 37 Pac. 401, Story's view is expressly recognized, but the case for decision distinguished because the instrument was not a promissory note.

⁹⁵ *Fear v. Dunlap*, 1 G. Greene 331, 334.

⁹⁶ Unchanged in the Revisions of 1860, §§1800, 1801, 1802, except that by §1813 notice was required in case of bills and notes according to the rules of commercial law. It was held that this statute did not require notice to the guarantor. *Sibley v. Van Horn*, 13 Iowa 209. Code of 1873, §2089 to §2092.

The authorities elsewhere on this indorser's liability are in confusion.⁹⁸ Will the Iowa court go back to the early statement⁹⁹ that there is no liability without proof of an undertaking to be liable for good consideration? The chief need for a settled rule here would probably be in instances where the parties have intended, all of them, to execute a negotiable bill or note, but where through some mistake of law or fact, have made a document which does not meet the technical requirements, and is a nonnegotiable note or no note at all. That frequently happens. For such a situation it would seem that §3049 might well be replaced on the statute book in so far as it applied to contracts not covered by the Negotiable Instruments Law.

To conclude; while nonnegotiable bills and notes are a class of instruments distinct from ordinary contracts in writing, the ever increasing commercial importance of the negotiable instrument has made them relatively unimportant. On the other hand, Iowa statutes, and likewise similar statutes in other States, have given to other written contracts most of the advantages accruing to the holder of a bill or note not negotiable. Consideration is presumed, genuineness of signature likewise, the rights against a transferor have been extended widely to other classes of contract. Just as the emphasis has been away from a distinction between sealed instruments and other writings to written and unwritten agreements, so the distinction has come to be between negotiable instruments and other written contracts. Commercial convenience demands the one as much as the other.

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⁹⁷ Code Sup. §3060-a64. "LIABILITY OF IRREGULAR INDORSER. Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

"1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

"2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

"3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee."

⁹⁸ They are set out in 8 C. J. 59 and notes. Some States, it is said, made the same rule whether the indorsement is on negotiable or non-negotiable paper. What will be the liability in a State where such indorser was liable as maker before the N. I. L. when the statute gives an indorser's liability only when the instrument is negotiable?

⁹⁹ *Fear v. Dunlap*, 1 G. Greene 331.

UNWHOLESOME FOOD AS A SOURCE OF LIABILITY

(II)

[In the previous article the writer has shown that in England the warranty of the wholesomeness of food is merely an application of the general warranty in sales by a dealer for a known purpose, and hence depends upon a "reliance by the buyer upon the skill and judgment of the seller"; but that in this country there is a warranty of wholesomeness peculiar to the sale of food, based upon the public policy of protecting the community from unwholesome provisions. He has also shown that a failure to distinguish between the English theory and our own has led some of our courts into error in the disposition of cases involving sales of canned goods and of those in which the sale was of food selected by the buyer from an assortment offered by the seller. He has further pointed out that the rule peculiar to the sale of food applies only in sales by a dealer to a consumer of food intended for human use and that the expression "sales for immediate consumption" has no reference to the time in which it is contemplated that the food is to be eaten.—ED.]

LIABILITY OF THE MANUFACTURER

We have seen that the manufacturer is liable to the dealer to whom he has sold unwholesome food of his own make and that this responsibility extends to the loss of trade occasioned by handling the defective goods.¹⁴⁸ *A fortiori*, if the dealer has been called upon to respond in damages to a consumer injured because of food which was unwholesome when purchased from the manufacturer, the former may "recoup himself" from the latter.¹⁴⁹ Thus in such a situation the injured consumer has a claim the burden of which will ultimately fall upon the manufacturer. It has been suggested that there is no short cut here; that no remedy exists other than the right of each vendee against his "immediate vendor".¹⁵⁰ But this

¹⁴⁸ *Neiman v. Channellene Oil & Mfg. Co.*, (1910) 112 Minn. 11; *Swain v. Schieffelin*, (1892) 134 N. Y. 471; *Masetti v. Armour & Co.*, (1913) 75 Wash. 622.

¹⁴⁹ *Ward v. Great Atlantic & Pacific Tea Co.*, (1918) 120 N. E. (Mass.) 225.

¹⁵⁰ *Nelson v. Armour Packing Co.*, (1905) 76 Ark. 352. The court says that there is no warranty that will run with the goods in such case, but the plaintiff had emphasized negligence more than he had warranty.

will often be inadequate. The dealer may be financially unable to respond to the extent of the injury; and while it would seem that the dealer's claim against the manufacturer should be held attachable by the consumer, it would not be a preferred claim in case of bankruptcy. Other difficulties present themselves. Though the manufacturer warrants that the food he makes is fit to eat, and the dealer warrants that the food sold to a consumer is wholesome, it frequently happens that the articles pass through the hands of several dealers and that such sales are bargains of specified goods inspected at the time, being accepted because the defect is not discoverable upon ordinary inspection. The process of tracing the responsibility back to its source by beginning with the dealer from whom the injured consumer made his purchase, will stop as soon as that person seeks to pass it on to his vendor who, under the hypothesis, was not the manufacturer. Hence in such situations, if each vendee can sue only his immediate vendor, the loss will fall either upon the dealer, if he is able to pay, or, if he is not, upon the consumer, in neither case getting back where it properly belongs.

But aside from this it would be a reproach to the law if the one ultimately answerable could not be held directly responsible by the person injured under such facts as these. A misunderstanding of *Winterbottom v. Wright*¹⁵¹ led to the adoption of the rule that a manufacturer is not liable for injuries resulting from his negligence in construction or use of materials to a purchaser of his vendee.¹⁵² Two exceptions did much to break down the force of this rule. One of these makes

"a manufacturer or vendor of an article or machine which he knows, when he sells it, to be imminently dangerous, by reason of a concealed defect therein, to the life and limbs of any one who shall use it for the purpose for which it was made and intended, liable to a stranger to the contract of sale for an injury which he sustains from the concealed defect while he is lawfully applying the article or machine to its intended use".¹⁵³

¹⁵¹ (1842) 10 M. & W. 109. See an excellent treatment of the problem, by Bohlen, "The Basis of Affirmative Obligations in the Law of Torts; II Lessors and Vendors of Real and Personal Property," 53 American Law Register 273. For the specific reference see p. 281.

¹⁵² *McCaffrey v. Mossberg & Granville Mfg. Co.*, (1901) 23 R. I. 381; *Huset v. J. I. Case Threshing Mach. Co.*, (1903) 120 Fed. 865, and the numerous cases there cited. See also Bohlen's article, and a note in 29 Harv. L. Rev., p. 866, and the cases there cited.

¹⁵³ *Huset case*, *supra*. The language quoted is put in the form of a question on page 866 and later answered in the affirmative. See also *Skin v. Reutter*, (1903) 135 Mich. 57.

The other is to the effect that like responsibility arises if the article sold was one "imminently dangerous".¹⁵⁴ Both of these exceptions are expressed in the *McCaffrey* case in these words:¹⁵⁵

"We think that the result of the cases on this subject clearly establishes the weight of authority in favor of the rule that where the cause of the injury is not in its nature imminently dangerous; where it does not depend upon fraud, concealment, or implied invitation; and where the plaintiff is not in privity of contract with the defendant, an action for negligence cannot be maintained."

The second exception demands an explanation as to what things are dangerous. In the *Loop* case it is said:¹⁵⁶ "Poison is a dangerous subject. Gunpowder is the same. A torpedo is a dangerous instrument, as is a spring gun, a loaded rifle or the like. . . . They are essentially, and in their elements, instruments of danger." It has been suggested that electricity¹⁵⁷ would come under this exception; so would gas,¹⁵⁸ gasoline,¹⁵⁹ certain machines¹⁶⁰ and drugs.¹⁶¹

If this exception is confined to articles imminently dangerous in their nature, the rule will have wide influence, but instead of limiting it to such things as explosives, electricity, gas and poisons, there has been some tendency to hold that it is met if the article, not in its normal shape, but in its defective condition, is dangerous. As said in the *MacPherson* case:¹⁶²

"We hold, then, that the principle of *Thomas v. Winchester* is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that

¹⁵⁴ Suggested in the *Huset* case, *supra*. See also *Loop v. Litchfield*, (1870) 42 N. Y. 351.

¹⁵⁵ *Supra*, at p. 387.

¹⁵⁶ *Supra*, p. 359.

¹⁵⁷ *Kentucky Utilities Co. v. Searcy*, (1916) 167 Ky. 840.

¹⁵⁸ *Sharkey v. Portland Gas. Co.*, (1915) 74 Or. 327.

¹⁵⁹ *Waters Pierce Oil Co. v. Deselms*, (1908) 212 U. S. 159; *Ives v. Welden*, (1901) 114 Iowa 476.

¹⁶⁰ The *McCaffrey* case, *supra*, held that the machine sold to a jeweler in that case was not within the exception; the *Huset* case, *supra*, indicates that a threshing machine is, although the decision seems to turn rather on the first exception than on the second. An automobile has been held to be under the rule and by other courts to be within the exception; see *MacPherson v. Buick Motor Co.*, (1916) 217 N. Y. 382, and cases cited. This case held the manufacturer liable, but on reasoning that goes far towards destroying the rule itself.

¹⁶¹ *Blood Balm Co. v. Cooper*, (1889) 83 Ga. 457; *Thomas v. Winchester*, (1852) 6 N. Y. 397.

¹⁶² *Supra*, p. 389.

it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully."

As so interpreted the exception nearly exhausts the rule, which by the way, is as it should be, for as shown in Professor Bohlen's article¹⁶³ the rule is unsound. He says:

"When, however, he is not merely the vendor of the article, but has made or repaired it or in any other way so dealt with it that to his active misconduct, or lack of adequate care and skill, the defective condition of the chattel must be attributed, is he not also liable as the wrongful creator of the injurious defect? It is submitted that he is, and that his liability is established by the current of English decisions and by the analogies of the cases just considered which deal with the effect of the alienation of real property."

But while it is suggested that there is a tendency to destroy this rule by its exceptions, it is not claimed that this result has been accomplished. We have, therefore, to consider whether food will come under the rule or within one of its exceptions, and incidentally, what influence, if any, this class of cases has had upon the development of this branch of the law.

A Wisconsin case¹⁶⁴ has brought the food cases under the exception by applying "imminently dangerous" to acts instead of to things, saying,¹⁶⁵ "The basis of the decision recognizes the distinction between acts which are imminently dangerous in their effects upon human life, limbs, and health and those that are not." A like result would be reached by applying the test of the *MacPherson* case; that we are to inquire whether the thing is dangerous, not in its normal operation, but in its defective condition. But a study of the line of cases which has so consistently¹⁶⁶ held that the manufacturer of food is answerable for his negligence even to those who have no privity of contract with him¹⁶⁷ leads to the conclusion that

¹⁶³ *Supra*, p. 292.

¹⁶⁴ *Haley v. Swift & Co.*, (1913) 152 Wis. 570.

¹⁶⁵ *Ibid.*, p. 572.

¹⁶⁶ See *Nelson v. Armour Packing Co.*, (1905) 76 Ark. 352, which holds that a sub-vendee cannot recover from the manufacturer of food because there was no "privity of contract". The court, however, seems to have been thinking more in terms of warranty than of negligence.

¹⁶⁷ *Ketterer v. Armour & Co.*, (1912) 200 Fed. 322; *Watson v. Augusta Brewing Co.*, (1905) 124 Ga. 121; *Salmon v. Libby, McNeill & Libby*, (1906) 219 Ill. 421; *Parks v. Pie Co.*, (1914) 93 Kan. 334; *Wilson v. Ferguson Co.*,

the deciding factor in excluding such cases from the operation of the "rule" is that the article in question was food. As summed up in the *Boyd* case,¹⁶⁸ "Practically all the modern cases are to the effect that the ultimate consumer of foods, medicines, or beverages may bring his action against the manufacturer for injuries caused by the negligent preparation of such articles." That food itself forms an exception to the rule is stated even more directly in a later case in the same court¹⁶⁹ in these words: "But to this rule there are well recognized exceptions, as is there set forth; one of these being foodstuffs." This is one of the "tobacco cases"¹⁷⁰ and the very fact that these decisions were argued from the standpoint of whether or not the law as to food should be extended in this respect to include chewing tobacco, is significant. The "soap cases" show the same tendency. In *Hasbrouck v. Armour & Co.*¹⁷¹ a needle in a bar of soap had injured a sub-vendee of the manufacturer, who was held not liable on the ground that the dropping of the needle in the soap and the resulting injury to the plaintiff were both extraordinary circumstances that "a person of ordinary prudence and discretion standing in this relation to the user or purchaser is not expected to foresee and provide against." But this argument is advanced to show that there was no such lack of due care as would bring the manufacturer within the exception that

"a manufacturer or vendor making and selling an article intended to preserve or affect human life is liable to third persons who sustain injury caused by his negligence in preparing, compounding, labelling, or directing the use of such articles, if such injury to others might have been reasonably foreseen in the exercise of ordinary care."

The tendency to cover the case by the rule as to food is seen by the expression "an article intended to preserve or affect human life".

(1913) 214 Mass. 265; *Jackson Coca Cola B. Co. v. Chapman*, (1914) 106 Miss. 864; *Tomlinson v. Armour & Co.*, (1908) 75 N. J. L. 748; *Freeman v. Schults Bread Co.*, (1916) 163 N. Y. S. 396; *Ternay v. Ward Baking Co.*, (1917) 167 N. Y. S. 562; *Rosenbusch v. Ambrosia Milk Corp.*, (1917) 168 N. Y. S. 505; *Ward v. Sea Food Co.*, (1916) 171 N. C. 33; *Catani v. Swift & Co.*, (1915) 251 Pa. 52; *Boyd v. Coca Cola B. Works*, (1914) 132 Tenn. 23; *Crigger v. Coca Cola B. Co.*, (1915) 132 Tenn. 545.

¹⁶⁸ *Boyd v. Coca Cola B. Works*, (1914) 132 Tenn. 23, 29.

¹⁶⁹ *Liggett & Myers Tobacco Co. v. Cannon*, (1915) 178 S. W. (Tenn.) 1009.

¹⁷⁰ The other is *Pillars v. Reynolds Tobacco Co.*, (1918) 78 So. (Miss.) 365, which held that the manufacturer is liable to the sub-vendee. Attention is invited to the fact that it is the more recent of the two cases which holds the manufacturer liable.

¹⁷¹ (1909) 139 Wis. 357. The quotations are on pp. 366 and 365 respectively.

In the Texas case¹⁷² the injury was caused by the ingredients of the soap and the manufacturer was held liable. The cases relied upon by the court in coming to this conclusion were those involving medicine¹⁷³ and food.¹⁷⁴ Thus while there is a dispute as to what is included within the meaning of "imminently dangerous" and as to how far the law as to food shall be extended in this respect, there is practically no dispute¹⁷⁵ as to the fact that the food cases are an exception to the rule that the manufacturer is not liable to strangers to the contract.

We have seen that in sales of food by a dealer to a consumer where the article transferred was food, the law introduced an exception to *caveat emptor*, which resulted in imposing liability even in the absence of fault. We have now found another instance in which there is an exception to a general rule when the article involved is food and our next inquiry is whether a like tendency is discoverable here. The answer is not difficult to find. Some of the courts suggest that the manufacturer's warranty that his food is fit for consumption is one which runs with the goods.¹⁷⁶ At times this indication is in such form as "that such warranty is available to all who may be damaged by reason of their [*i. e.*, the manufactured foods] use in the legitimate channels of trade"¹⁷⁷ or "The contention that the warranty did not extend to subsequent purchasers after the meat passed through the hands of middlemen cannot be sustained."¹⁷⁸ While one court states without hesitation that "The authorities are numerous that there is an implied war-

¹⁷² *Armstrong Packing Co. v. Clem*, (1912) 151 S. W. (Tex. Civ. App.) 576. Here as in the tobacco cases it happens that it is the more recent of the two cases which holds the manufacturer liable.

¹⁷³ *Thomas v. Winchester*, (1852) 6 N. Y. 397.

¹⁷⁴ *Tomlinson v. Armour & Co.*, (1908) 75 N. J. L. 748.

¹⁷⁵ See note 166.

¹⁷⁶ *Ward v. Morehead City Sea Food Co.*, (1916) 171 N. C. 33, 34; *Catani v. Swift & Co.*, (1915) 251 Pa. 52, 56; *Boyd v. Coca Cola B. Works*, (1914) 132 Tenn. 23, 30; *Masetti v. Armour & Co.*, (1913) 75 Wash. 622, 630. *Contra*, see, *Nelson v. Armour Packing Co.*, (1905) 76 Ark. 352, 355; *Roberts v. Anheuser Busch Brew. Ass'n*, (1912) 211 Mass. 449, 451; *Crigger v. Coca Cola B. Works*, (1915) 132 Tenn. 545. Note that the cases *contra* are all earlier than the others except the *Crigger* case. In this one the court, while receding from the notion of a warranty running with the goods and while talking about negligence is yet holding to a liability which is absolute and not based upon carelessness, as will be discussed later.

¹⁷⁷ *Masetti v. Armour & Co.*, *supra*, p. 630.

¹⁷⁸ *Catani v. Swift & Co.*, *supra*, p. 56.

ranty that runs with the sale of food for human consumption, that it is fit for food and is not dangerous and deleterious."¹⁷⁹

Other courts have reached the same result by holding that the manufacturer of food "must know that it is fit or take the consequences if it proves destructive."¹⁸⁰ In other words one who engages in this occupation owes to the public not merely a duty to use care in his work, but an absolute duty to see to it that he does not endanger the lives and health of the community by putting unwholesome food on the market.¹⁸¹ Most of these cases are since 1913, but as early as 1905 Chandler, J., said:¹⁸²

"When a manufacturer makes, bottles, and sells to the retail trade, to be again sold to the general public, a beverage represented to be refreshing and harmless, he is under a legal duty to see to it that in the process of bottling no foreign substance shall be mixed with the beverage which, if taken into the human stomach, will be injurious."

"Defendant's duty was absolute" is the terse way in which the law is stated in *Catani v. Swift & Co.*¹⁸³

Some of the cases speak of this liability existing when the food was "dispensed in original packages"¹⁸⁴ or was put on the market "in bottles or sealed packages."¹⁸⁵ These, however, are not decisions which limit the rule to such situations, but are cases in which the article having been in fact transferred in that form, the court uses language which will dispose of the issue without unnecessarily including other situations which may come before it later. In a case in which the article sold was a pie¹⁸⁶ the liability was held to exist. If we should say that each individual pie is "an original package" we would go far towards making that expression so inclusive as to be meaningless. The Kansas court held the manufacturer liable without resorting to such interpretation, and it is clear that the manufacturer should not escape in such an instance if the

¹⁷⁹ *Ward v. Sea Food Co.*, *supra*, at p. 34.

¹⁸⁰ *Parks v. Pie Co.*, (1914) 93 Kan. 334.

¹⁸¹ *Watson v. Augusta Brewing Co.*, (1905) 124 Ga. 121; *Jackson Coca Cola B. Co. v. Chapman*, (1914) 106 Miss. 864; *Pillars v. Reynolds Tobacco Co.*, (1918) 78 So. (Miss.) 365; *Ternay v. Ward Baking Co.*, (1917) 167 N. Y. S. 562; *Rosenbusch v. Ambrosia Milk Corp.*, (1917) 168 N. Y. S. 505; *Catani v. Swift & Co.*, (1915) 251 Pa. 52; *Crigger v. Coca Cola B. Works*, (1915) 132 Tenn. 545.

¹⁸² *Watson v. Augusta Brewing Co.*, *supra*.

¹⁸³ *Supra*, at p. 62.

¹⁸⁴ *Mazetti v. Armour & Co.*, *supra*, at p. 30.

¹⁸⁵ *Crigger v. Coca Cola B. Works*, *supra*, at p. 552.

¹⁸⁶ *Parks v. Pie Co.*, (1914) 93 Kan. 334.

injured consumer had purchased only half of the unwholesome pie.

In a New York case¹⁸⁷ the manufacturer sought to defeat recovery by setting up that there was no charge in the complaint that the powdered milk was in the same condition when used by the consumer as when prepared by the defendant. To this the court replied:¹⁸⁸

"I am of the opinion that it will not be an unreasonable extension of principles of liability already established to hold that the manufacturer in such case is chargeable with negligence, where it knows or should know that the product is liable to deteriorate either by time, climate, or temperature, or the manner in which it is kept, if it fails to affix to the package the date of manufacture and the time during which the ingredients may safely be used, or the manner in which they should be handled and preserved to prevent deterioration."

This rule would obviously not apply to pies or articles of that nature but should be limited to commodities such as the powdered milk in this case, whose peculiarities of deterioration are not commonly known.

It is to be observed that the manufacturer in this case is to be charged with negligence, not for a failure to use due care in the premises, but for a failure to affix the proper label. In some of the cases it is even more manifest that "negligence" has been used to indicate a failure to perform an absolute duty. In none is this illustrated better than in the *Crigger* case.¹⁸⁹ The court says that

"This liability is based on an omission of duty or an act of negligence, and the way should be left open for the innocent to escape. However exacting the duty or high the degree of care to furnish pure foods, beverages, and medicines, we believe with Judge Cooley . . . that negligence is a necessary element in the right of action".

But the way in which the innocent escaped in this case was by introducing evidence of such "extraordinary care" that the court concludes that the decomposed mouse found in the bottle of Coca Cola must have been put in by "malevolent persons" who opened up the bottle for that purpose. Yet in spite of the fact that such "extraordinary care" had been shown the court says that "if in the light of the finding by the jury it were fairly inferable that the mouse was bottled up at the Bottling Company plant, we would

¹⁸⁷ *Rosenbusch v. Ambrosia Milk Corp.*, (1917) 168 N. Y. S. 505.

¹⁸⁸ *Ibid.*, p. 508.

¹⁸⁹ *Crigger v. Coca Cola B. Works*, (1915) 132 Tenn. 545, 552.

consider it our duty to reverse the case, because of the high duty resting on the defendant," having previously quoted with approval from the Georgia case:¹⁹⁰

"When a manufacturer makes, bottles, and sells . . . a beverage represented to be refreshing and harmless, he is under a legal duty to see to it that in the process of bottling no foreign substance shall be mixed with the beverage which, if taken into the human stomach, will be injurious",

adding that this is "a duty one owes to the public not to put out articles to be sold upon the markets for use injurious in their nature".

In short the defendant is excused, not because he used "extraordinary care" to prevent including any foreign substance in his bottles, but because the court decides that this substance was not bottled by him. If it had been he would be liable notwithstanding his care. In the Georgia case, from which this court quotes, there was also reference to the "duty not negligently to injure", but in addition to the statement that the manufacturer is under a legal "duty to see to it that . . . no foreign substance shall be mixed with the beverage", there is the affirmation that the purchaser has the "right to rest secure in the assumption that he will not be fed on broken glass".

In *Pillars v. Tobacco Company*¹⁹¹ it is said: "We can imagine no reason why, with ordinary care, human toes could not be left out of chewing tobacco, and if toes are found in chewing tobacco, it seems to us that somebody has been very careless." But in spite of the "imagine" and the "seems" here, as in the other cases, a study of the decision reveals the fact that what the court has in mind is that if the poisonous or deleterious substance got into the food, whatever care was exercised, it was not enough. The care required is that care which will keep the food wholesome; nothing less will do.

It is by no means remarkable that the courts show a tendency to word the liability in terms of negligence, because practically the whole of the development of "insurer's liability" in the case of the manufacturer of food has taken place within the last decade. It may be, moreover, that there is some justification for the use of the word "negligence" to indicate a lack of the care required by law even though under the particular circumstances the care required

¹⁹⁰ *Watson v. Augusta Brewing Co.*, (1905) 124 Ga. 121.

¹⁹¹ *Supra*, at p. 366.

was absolute.¹⁹² But at least one case has held the manufacturer liable without any reference to care or negligence.¹⁹³ However this may be, the tendency of the present time is clearly to impose upon the manufacturer of human food an "insurer's liability" as to its wholesomeness. Since he is in a much better position to know the condition of his food and to guard against impurities than is the ordinary dealer, the liability without fault imposed upon the latter for the protection of lives and health of the public, may with greater reason be extended to the former.¹⁹⁴

LIABILITY OF A DEALER TO ONE NOT HIS VENDEE

In *Gearing v. Berkson*¹⁹⁵ it was held that the wife of a purchaser had no cause of action against a dealer, who, without negligence, had sold impure food to her husband. If the sale of unwholesome food results from the dealer's negligence, there is no question that the one injured by eating it may recover from him whether that one is the buyer or not;¹⁹⁶ while the implied warranty of wholesomeness will be available only to the other party to the contract, if the usual rule of warranty in the sale of chattels is followed. On the other hand, since in order to protect the lives and health of the community, the dealer of food "must know that it is fit, or take the consequences if it proves destructive"¹⁹⁷ and since "the remedies of injured consumers ought not to be made to depend upon the

¹⁹² See 4 Iowa Law Bulletin 102.

¹⁹³ *Jackson Coca Cola B. Co. v. Chapman*, (1914) 106 Miss. 864.

¹⁹⁴ A number of cases deal with the responsibility of the manufacturer for injury caused by the explosion of a bottled beverage, such as Coca Cola. See *Hudgins v. Coca Cola B. Co.*, (1905) 122 Ga. 695; *Payne v. Rome Coca Cola B. Co.*, (1912) 10 Ga. App. 762; *Stone v. Van Noy B. News Co.*, (1913) 153 Ky. 240; *Wheeler v. Laurel B. Works*, (1916) 71 So. (Miss.) 743; *Glaser v. Seitz*, (1901) 71 N. Y. S. 942; *Willey v. Mynderse*, (1915) 151 N. Y. S. 280; *Grant v. Graham Chero-Cola B. Co.*, (1918) 97 S. E. (N. C.) 27; *Weiser v. Holzman*, (1903) 33 Wash. 87.

¹⁹⁵ (1916) 223 Mass. 257.

¹⁹⁶ *Craft v. Parker, Webb & Co.*, (1893) 96 Mich. 245. The outrageous suggestion in *Farrell v. Manhattan Market Co.*, (1908) 198 Mass. 271, to the effect that the dealer is not liable for the consequences of his negligence, is not followed in *Gearing v. Berkson*, the absence of negligence being there relied upon.

¹⁹⁷ *Parks v. Pie Co.*, (1914) 93 Kan. 334, quoted with approval in *Flessner v. Carstens Packing Co.*, (1916) 93 Wash. 48. This suggestion really originates with the *Van Bracklin* dictum, where the wording was that "in the sale of provisions for domestic use, the vendor is bound to know that they are sound and wholesome at his peril". This sentence has been quoted frequently by the courts.

intricacies of the law of sales",¹⁹⁸ if the right is limited to the vendee of the unwholesome food it is because of technicality rather than reason. The peculiar responsibility imposed upon the dealer of foods is a form of "insurer's liability". Because it happened by accident to go under the name of implied warranty, it has so far been limited in favor of the actual buyer, but although the reason is not as great as where the party sought to be held is the manufacturer, it would not be greatly surprising if the courts would refuse to be bound by this limitation.

LIABILITY OF THE KEEPER OF A PUBLIC EATING PLACE

The proprietor of a public eating place, in which by reason of negligence unwholesome food has been served, is liable to the injured patron.¹⁹⁹ As said in one case,²⁰⁰ such person

"was bound to use due care to see that the foodstuffs served at his place of business to his customers were fit for human consumption and could be partaken of without causing sickness or endangering human life or health because of their unwholesome and deleterious condition; and, for any negligence in this particular"

he was liable. Some cases have held that the burden of proof rests on the plaintiff to show wherein the defendant was negligent,²⁰¹

¹⁹⁸ *Ketterer v. Armour & Co.*, (1912) 200 Fed. 322, 323, quoted with approval in *Catani v. Swift & Co.*, (1915) 251 Pa. 52, 57.

¹⁹⁹ *Pantaze v. West*, (1913) 7 Ala. App. 599; *Bishop v. Weber*, (1885) 139 Mass. 411. The second case involves the liability of a caterer at a ball. See also *Malone v. Jones*, (1914) 91 Kan. 815, in which it was held that a person is responsible for negligently serving unwholesome food in his own home to a farm hand whose board is included in his contract of employment.

²⁰⁰ *Pantaze v. West*, *supra*. And see a similar statement in *Greenwood Cafe v. Lovinggood*, (1916) 72 So. (Ala.) 354.

²⁰¹ *Travis v. Louisville & N. E. Co.*, (1913) 62 So. (Ala.) 851 (see p. 854); *Jacobs v. Childs Co.*, (1916) 166 N. Y. S. 798. In the New York case the plaintiff did not show any evidence of negligence except that she was injured by a nail concealed in a piece of cake; *res ipsa loquitur* being relied upon but held not to be available for the purpose. The court says: "If the nail had been necessarily used in the making of the cake or were an integral part thereof, a different situation would be presented. In such a case it is the maker's duty to have all parts of the whole in proper condition or properly adjusted" (p. 799). See *Freeman v. Schults Bread Co.*, (1916) 163 N. Y. S. 396, in which the plaintiff who was suing the manufacturer of bread (who had sold the bread in question to a grocer from whom it was purchased by plaintiff's sister) introduced evidence that he lost two teeth by biting on a nail concealed in the loaf and that there were no nails in his "home or in the grocer's store with which the bread could have come in contact". The Judge (Marks) said, "I believe that there was enough for me to find that the nail imbedded

but the theory of one court, at least, is that after the plaintiff has established the fact that he was served with unwholesome food and was injured by eating it, the defendant is required to show that due care had been used by him and his servants.²⁰²

A number of cases,²⁰³ including two from Massachusetts,²⁰⁴ have held that where the action is in tort with an allegation of negligence, no question of implied warranty can be raised. One of these decisions²⁰⁵ called forth the comment²⁰⁶ that

"it is held in Massachusetts, following the early law of England, still generally prevailing where common law forms of action are preserved,²⁰⁷ that action on a warranty may be in tort and neither *scienter* nor negligence on the part of the defendant need be alleged or proved. Since this is true, it is difficult to see why a plaintiff should lose his case by the superfluous allegation of negligence, if, as can hardly be doubted, his pleading contained a statement of all the facts necessary to establish an implied warranty within the principle simultaneously announced by the Massachusetts Court."

This leads us to inquire whether there is an implied warranty that food served in a hotel, restaurant or diner is wholesome and fit to eat. In considering this problem some cases have held that no sale is involved in such transactions.²⁰⁸ Since most of the decisions

in the bread was in the bread when delivered to the grocer, for which the defendant is liable." See also *Ternay v. Ward Baking Co.*, (1917) 167 N. Y. S. 562, which holds that a baker (who sold to a dealer who sold to the plaintiff) is liable for injury caused by glass in bread, upon proof that the glass was there when delivered by him to the dealer. The last of these New York cases was in the Supreme Court, the other two were decisions of municipal courts. The second and third should be compared with the first, although they do not deal with food served in a public eating place, because of the New York rule as to the nature of such transactions.

²⁰² Alabama; see *Greenwood Cafe v. Lovinggood*, (1916) 72 So. 354. The court mentions no evidence of negligence except such as can be inferred from the serving of impure food, and says that "the fact that witness frequently inspected his place was not competent evidence to explain the condition of the chicken served to the plaintiff." See also the preceding note.

²⁰³ *Sheffer v. Willoughby*, (1896) 163 Ill. 518; *Crocker v. Baltimore Dairy Lunch Co.*, (1913) 214 Mass. 177; *Ash v. Childs Dining Hall Co.*, (1918) 120 N. E. (Mass.) 396; *Jacobs v. Childs Co.*, (1916) 166 N. Y. S. 798.

²⁰⁴ Cited in the preceding note.

²⁰⁵ *Ash v. Childs Dining Hall Co.*, *supra*.

²⁰⁶ See an editorial note, "Implied Warranty of Food", 32 Harv. L. Rev. 71, 74.

²⁰⁷ Citing *Shippen v. Bowen*, (1887) 122 U. S. 575.

²⁰⁸ *Merrill v. Hodson*, (1914) 88 Conn. 314; *Valeri v. Pullman Co.*, (1914) 218 Fed. 519. *Travis v. Louisville & N. E. Co.*, (1913) 62 So. (Ala.) 851, does so in effect by holding that there is no implied warranty in such situations, which would not be true if they were sales. *Sheffer v. Willoughby*, (1896)

have turned upon this point it demands first consideration. A learned writer has said of this that²⁰⁹

"As an innkeeper does not lease his rooms, so he does not sell the food he supplies to the guest. It is his duty to supply such food as the guest needs, and the corresponding right of the guest is to consume the food he needs and to take no more. Having finished his meal, he has no right to take food from the table, even the uneaten portion of food supplied to him; nor can he claim a certain portion of food as his own, to be handed over to another in case he chooses not to consume it himself. The title to food never passes as a result of an ordinary transaction of supplying food to a guest; or as it was quaintly put in one old case 'he does not sell but utters his provision.'"

That this is the English theory, at least to the extent of holding that the innkeeper is not a trader within the bankruptcy statutes, is shown by several cases,²¹⁰ but whether it is correct in theory or not it has not been accepted generally by the courts in this country.

In 1879 this question arose in the form of whether furnishing intoxicating liquors with meals, no separate charge being made for the liquors, constituted a sale of the intoxicants. It was held that it did, *Ames, J.*, saying²¹¹ that

"The purchase of a meal includes all the articles that go to make up the meal. It is wholly immaterial that no specific price is attached to those articles separately. If the meal included intoxicating liquors, the purchase of the meal would be a purchase of the liquors. It would be immaterial that other articles were included in the purchase, and all were charged in one collective price."

No less direct is the language of *Clark, J.*, in a case²¹² in which the question was whether there had been an illegal sale of oleomargarine²¹³ which had been served with a meal for which fifty cents had been paid.

163 Ill. 518, held the restaurant keeper not liable in that case, but in *Wiedeman v. Keller*, (1898) 171 Ill. 93, 99, it is said of the other decision that it "has no bearing on this case, as that case was predicated by the plaintiff upon the sole ground of the negligence of the defendant", intimating that for this reason the matter of implied warranty was not properly considered at all.

²⁰⁹ BEALE ON INNKEEPERS, §169. This passage is quoted in *Valeri v. Pullman Co.*, *supra*, at p. 520, and (except the last clause) in *Merrill v. Hodson*, *supra*, at p. 318.

²¹⁰ *Crisp v. Platt*, (1640) Cro. Car. 549; *Newton v. Trigg*, (1686) 3 Mod. 327; *Parker v. Flint*, (1699) 2 Mod. 254 (dictum); *Saunderson v. Bowles*, (1767) 4 Burr. 2064. But see the Year Book, 9 Henry VI 53, where it is said, "If I go to a tavern to eat, and the taverner gives and sells me meat", etc.

²¹¹ In *Com. v. Worcester*, (1879) 126 Mass. 256, 257. See also *State v. Lotti*, (1900) 72 Vt. 115, in which the same conclusion is reached.

²¹² *Com. v. Miller*, (1890) 131 Pa. 118. The quotation is from p. 123.

²¹³ The statute provided that "every person . . . who shall manufacture, sell, or offer, or expose for sale, or have in his . . . possession with intent to sell [oleomargarine] shall, for every such offense", etc.

"The oleomargarine was furnished to the person named as food, and the price was paid. As the learned judge of the court below well said, it was not given away, and the fact that it was not sold separately, but with other articles, for a gross sum, would not make it less a sale."

Milk which was served to a guest with his meal in a restaurant, but which was not up to the standard required by statute, was held to have been illegally sold by another court which said:²¹⁴

"The milk bought by the witness Kelly was purchased by and delivered to him as a part of his breakfast, and was just as much a sale as if a specific price had been put upon it, or it had been bought and paid for by itself."

To like effect is the holding of the Kentucky court²¹⁵ which said:

"The guest at the hotel or restaurant who is served with quail for compensation as certainly purchases it and the proprietor of the hotel or restaurant as certainly exposes it for sale and sells it as if it were purchased for compensation from a dealer who had it for sale and was carried home by the purchaser to be served on his table."

The service in this case was *a la carte*, which, it was suggested in one case,²¹⁶ might present a clearer case of sale than where the service is *table d'hôte*, as it was in the other cases cited on this point. But the most recent of this line of criminal cases²¹⁷ held that a hotel keeper who served game to guests who paid nothing therefor except that it was included in their "board and room" for which they paid \$2.00 per day, sold such game to these guests. The court said: "The service of prohibited game as a part of a *table d'hôte* meal is necessarily a sale of such game, and it is paid for by the payment for the meal, at least to the extent of a part of the agreed price for such meal."

If such a proprietor can be held to the criminal responsibilities of a vendor in these transactions, he can also be held to the civil responsibilities of one, and most of the cases have so held.²¹⁸ This clearly does not mean that a customer at a restaurant may put

²¹⁴ *Com. v. Warren*, (1894) 160 Mass. 533. The quotation is from p. 535.

²¹⁵ *Com. v. Phoenix Hotel Co.*, (1914) 157 Ky. 180. The quotation is from p. 185.

²¹⁶ *Valeri v. Pullman Co.*, (1914) 218 Fed. 519, 521.

²¹⁷ *People v. Clair*, (1917) 221 N. Y. 108. The quotation is from p. 111.

²¹⁸ *Friend v. Childs Dining Hall Co.*, (1918) 120 N. E. (Mass.) 407; *Race v. Krum*, (1914) 146 N. Y. S. 197; *Leahy v. Essex Co.*, (1914) 148 N. Y. S. 1063; *Muller v. Childs Co.*, (1918) 171 N. Y. S. 541 (dictum); *Barrington v.*

in his pockets and carry away such of the food served to him as he does not care to eat at the time. But whether we view the transaction as one in which the patron is given the power to select the goods to which title is to pass to him, by eating them, or as a sale with a condition subsequent that title to food not eaten shall revert to the proprietor, the cases show that the clear weight of authority in this country is that there is a sale involved in the service of food in a public eating house. If it be argued that this result has been reached in order to prevent the proprietor from escaping from certain responsibilities which should be his, the answer is, first: that it has been reached, and second: that the English cases which held otherwise in order to exclude the inn-keeper from the bankruptcy statutes seem to have been influenced in no small degree by the notion that this person has so many peculiar burdens that he may reasonably be excused from involuntary bankruptcy.²¹⁹

But it seems unfortunate that this problem should be argued so largely from "the intricacies of the law of sales", especially in

Hotel Astor, (1918) 171 N. Y. S. 840; *Race v. Krum*, (1918) 222 N. Y. 410. In *Race v. Krum*, the Court of Appeals suggested that "it must be borne in mind that we are not dealing with the liability of hotel proprietors, restaurant keepers, dining car managers, or people engaged in business of that kind, but are considering solely the liability of a dealer who makes or prepares the article that he is selling." But the court finds that the service of ice cream in a drug store, to be eaten at the counter, constitutes a sale, adding that "the general rule established by the weight of authority in the United States and England is that accompanying all sales by a retail dealer of articles of food for immediate use there is an implied warranty that the same is fit for human consumption." The court then emphasizes that the rule is a sound one and is based upon "the high regard which the law has for human life". This taken together with the statement of the court in *People v. Clair*, (1917) 221 N. Y. 108, that "the service of prohibited game as a part of a *table d'hôte* meal is necessarily a sale of such game", can leave no doubt as to what the court will decide when the matter comes squarely before it, for if we admit that the courts may strain the law to the limit to reach a result which will not make such a statute useless, "the high regard for human life" is certainly as impelling a motive as the upholding of the force of a game statute. As a matter of fact the proprietor of a hotel or restaurant does "make or prepare" the food served in most instances, but since the court holds that a sale is involved in such transactions and approves the rule of implied warranty in sales of food, the reservation as to hotels and restaurants seems to be an unnecessary precaution. See also *Bigelow v. Maine Cent. Rd. Co.*, (1912) 110 Me. 105, in which the decision goes off on the theory that the usual warranty does not apply to a resale of canned goods, but gives the impression that the food served in the diner would be accompanied by a warranty if it were not canned goods.

²¹⁹ See note 210.

view of the fact that in one case at least the court felt that to decide that no sale exists in such transactions settled the whole matter and necessarily precludes a recovery by an injured patron unless he shows negligence.²²⁰ There is one refreshing case,²²¹ however, which shows that

"It is ancient law that when one resorts to a tavern, inn or eating place, there for a consideration to be served with food for immediate consumption, and is received as a guest by the keeper, a duty is implied that the food shall be fit to eat. It has been said that: 'If a man goes into a tavern for refreshment, and corrupt drink or meat is there sold to him, which occasions his sickness, an action clearly lies against the tavern keeper; . . . and action lies against him without express warranty for it is a warranty in law.' Keilway's Rep. 91; *Burnby v. Bollett*, 16 M. & W. 644, 646, 647, 654, where are the references to numerous older cases. 'A taverner or vintner was bound as such to sell wholesome food and drink.' Ames, Lectures on Legal History, p. 137, citing also cases from the year books."

On principle there can be no doubt that a person has greater opportunity to protect himself from unwholesome food which he prepares for his own table, than from that which is prepared for him in a hotel or restaurant. Hence the rule of law which is devised for the protection of the health and lives of the public, has greater reason to operate in the latter instance than in the former. This being true, it is gratifying to find that in spite of a few statements to the contrary,²²² the present tendency in this country is to make the proprietor of a public eating house an "insurer" of the quality of his food.²²³

²²⁰ *Merrill v. Hodson*, (1914) 88 Conn. 314. See the Harv. L. Rev., editorial note, *supra*, at p. 72, where this possibility is suggested. A careful study of the case cited leaves little doubt that such was the reaction of that court.

²²¹ *Friend v. Child's Dining Hall Co.*, (1918) 120 N. E. (Mass.) 407. See pp. 408 and 409 in particular.

²²² *Sheffer v. Willoughby*, (1896) 163 Ill. 518: "As respects the goods of a guest which he takes with him when he stops at an inn, the inn-keeper is practically an insurer, . . . But as to food served at a restaurant . . . we are not aware that a similar rule establishing liability ever existed." But see *Wiedeman v. Keller*, (1898) 171 Ill. 93, 99, which says of the *Sheffer* case that it "has no bearing on this case, as that case was predicated by the plaintiff upon the sole ground of the negligence of the defendant" and not upon the existence or non-existence of liability without fault. *Valeri v. Pullman Co.*, (1914) 218 Fed. 519, 522, quotes from BEALE ON INNKEEPERS, §169: "The innkeeper is not an insurer of the quality of his food, but he would be liable for knowingly or negligently furnishing bad or deleterious food."

²²³ In addition to the cases previously cited see *Doyle v. Fuerst & Kraemer*, (1911) 129 La. 838; *Bark v. Dixon*, (1911) 115 Minn. 172; *Barrington v. Hotel Astor*, (1918) 171 N. Y. S. 840.

TRICHINAE

In the recent case of *Tavani v. Swift & Co.*,²²⁴ the plaintiff brought an action in trespass to recover for injuries received from eating pork, infected with trichinae, sold by the defendant. The defendant introduced evidence to show that there is no satisfactory method known to science by which the presence of this parasite can be detected, but that it can be rendered harmless by proper cooking; that for this reason the government omits any inspection for trichinae in order that the public may not be led into a sense of false security and omit proper precautions in preparing pork for the table; and that for the same reason packers also do not make an inspection for this parasite. It was held that²²⁵ "the action being in trespass for negligence and not for breach of warranty, the evidence was competent and sufficient to sustain the conclusion of the jury that defendant omitted no precaution or duty it owed plaintiff." *Catani v. Swift & Co.*,²²⁶ is distinguished on the ground that no more was held by that decision than that the mere fact of inspection by the federal government was not sufficient to excuse the defendant from its common law duty to sell wholesome food.

Paragraph one of the syllabus of the Atlantic Reporter is misleading. It reads, "A dealer selling meat for human consumption is not liable in damages for selling pork infected with trichinae, if he proves that there was no negligence in such sale." This entirely overlooks: first, that the court decides that defendant is not liable in an action of trespass for negligence²²⁷—not that he would not be liable in an action for breach of an implied warranty of wholesomeness; second, that this is not an action against a dealer who sold to the plaintiff, but one against the manufacturer who sold to a dealer from whom the plaintiff made his purchase. This fact is not expressly mentioned by the court, but is made clear by the statement that the facts in this case are similar to those in the *Catani* case²²⁸ in which the suit was by a sub-vendee.

Since the court said in the *Catani* case that²²⁹ "the contention that the warranty did not extend to subsequent purchasers after the meat passed through the hands of middlemen cannot be sus-

²²⁴ (1918) 105 Atl. (Pa.) 55.

²²⁵ *Ibid.*, see p. 56.

²²⁶ (1915) 251 Pa. 52.

²²⁷ See note 206.

²²⁸ *Supra*.

²²⁹ *Supra*, at p. 56.

tained" it seems that counsel made a mistake in his form of action.²⁸⁰ It would at least have been interesting to have had that point disposed of in the decision. The court may have been influenced largely, however, by the notion that the plaintiff was injured by reason of the fact that he did not sufficiently cook the meat, which presents a problem of no small interest. If it can be established that it is a fact of common knowledge that pork frequently contains trichinae; and that it can be rendered harmless by proper cooking, it is obvious that if any negligence existed in the case it was that of the plaintiff. From the same premise it would also be arguable that no implied warranty of wholesomeness should cover such a situation. There are doubtless a number of foodstuffs sold on the market which would produce injurious results if not properly prepared for the table, and it may well be that the warranty implied in the sale of pork is that it will be fit for human food if properly cooked. This of course has reference to the sale of uncooked meat only. If the sale contemplates that the article will be eaten as it is, as for example where cooked pork is purchased from a delicatessen, no question could arise as to the fact that the warranty would cover the preparation of the food. For like reason if the food was served in a public eating house, the proprietor should be liable for injuries resulting from the presence of this parasite. This would seem to follow even if such person were liable only for negligence, which we have seen is not the general rule. But in sales of raw pork, whether by a dealer or manufacturer, there is reason to say that the implied warranty of wholesomeness does not apply to trichinae. The theory, however, is not that he is excused because of the difficulty or impossibility of detecting the presence of this defect, but because the so-called "defect" is one which will produce harmful results only if the food is eaten without being properly prepared. Hence the paragraph of the syllabus quoted, while not correctly stating the holding of that case, has much to be said in its favor as an abstract statement of law.

LEGISLATION

The scope of this discussion will not justify a consideration of statutes peculiar to any jurisdiction, such as that of Pennsylvania²⁸¹ which provides that

²⁸⁰ But see note 206.

²⁸¹ Act of May 4, 1889, P. L. 87, applied to a sale between dealers in *Weiss v. Swift & Co.*, (1908) 36 Pa. Superior Ct. 376.

"In every sale of . . . merchandise used wholly or in part for food . . . unless the parties shall agree otherwise, there shall be an implied contract or undertaking that the goods or merchandise are sound and fit for household consumption."

But there are two general types of legislation the influences of which should not be entirely ignored. They are the Uniform Sales Act and pure food laws. The Uniform Sales Act²³² provides that

"Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

"(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

"(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

"(3) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed".²³³

The clause of sub-section one which speaks of making "known to the seller the particular purpose for which the goods are required" demands first consideration. If in a given case it be argued that the particular purpose for which that food was sold was that it should be eaten, we might well wonder what is the general purpose for which food, as a class, is sold. The best solution of this difficulty is offered by Holmes, L. J.,²³⁴ in this language:

"The true question is, what is meant by 'a particular purpose'? . . . I ask a vendor of fruit to show me some apples, and I tell him that they are

²³² §15. See WILLISTON ON SALES, §227.

²³³ "(4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

"(5) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

"(6) An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith."

²³⁴ In *Wallis v. Wallis*, (1902) 2 Ir. R. 585, 633. This, of course, was said with reference to the English Sale of Goods Act, but see *Ward v. Great Atlantic & Pacific Tea Co.*, (1918) 120 N. E. (Mass.) 225, 227, where it is said that "the English Sale of Goods Act, sec. 14, sub-sec. 1 . . . does not differ in any particular material to the present case [i. e., sale of unwholesome food by a dealer to a consumer] from section 15 (1) of our Sales Act."

for a special purpose. If I say that they are to make up a dessert dish for that day's dinner, or to be stored during the winter, or to be converted into cider, or to be cooked in a pie or pudding, he understands me, and he produces apples which he believes to be suited for the purpose indicated. These cases suggest one construction of sub-section 1—a construction which emphasizes 'particular' as contrasted with 'general,' much in the same way as species is distinguished from genus. The language is capable of this interpretation, and some reasons can be offered for adopting it. . . . It has been after great fluctuation of mind that I have decided to reject them. . . . The construction of the sub-section must be gathered from all its parts; and I think that the key that unlocks the meaning of 'particular purpose' may be found in the words 'so as to show that the buyer relies on the seller's skill and judgment'. . . . If a purchaser of apples, by calling attention to the fact that they are wanted for dessert, secures a warranty that the fruit supplied is fit therefor, the warranty is broken whether they prove to be rotten dessert apples or good baking apples. Why should there be a warranty implied in this case if there is not also a warranty in favor of the buyer of a razor who, without looking at the article offered him, tells the vendor pointedly that the razor is to shave? The only way of avoiding this and kindred anomalies is to adopt the view of the Lord Chief Baron in the Divisional Court, and to read 'particular purpose' as meaning any purpose made known by the buyer to the seller'.²³⁵

Which, we may add, in the case of food is thus made known to the seller "by implication" from the very fact that such articles are called for. In brief, the natural growth of the rule has been such that the word "particular" which originally had a place therein, has become mere surplusage and can be entirely disregarded.²³⁶ At the same time a like development has given the same force to a purpose made known by implication as to one expressly stated.

Thus the purchaser of food, by his very offer to buy articles of that character, makes known to the seller the (particular) purpose

²³⁵ The quotation continues: "although this has the effect of making the word 'particular' surplusage, statutes are scarcely more free from this defect than general literature, in which a loose or redundant use of this adjective is very common." The law maker might well reply that in this respect he has made only the same use of the word as was previously made by the courts, because although the original use of the word "particular" in this rule was very narrow, its scope grew rapidly. The original use was explained in a part of the opinion not quoted in the text, in these words: "The sub-section is a paraphrase of the fourth proposition laid down by Mellor, J., in his judgment in *Jones v. Just*, (L. R. 39 Q. B. 197), already quoted; and the learned Judge left little doubt of his meaning by the authorities with which he illustrated it—*Jones v. Bright* (5 Bing. 533), where the article sold was copper sheathing, which the seller was informed was for the buyer's ship; and *Brown v. Edgington* (2 M. & G. 279), where the purchaser required a rope to be used to raise barrels of wine from a cellar."

²³⁶ See the preceding note.

for which the goods are required,²³⁷ so that in order to imply a warranty under sub-section one we have only to find that he relied upon the skill and judgment of the seller. If the vendor was in no sense of the word a dealer, the mere fact of the sale would not indicate a reliance upon his skill and judgment. If he was a dealer in foodstuffs and the selection was left to him, there can be no doubt that an implied warranty of wholesomeness would be raised by sub-section one,²³⁸ at least if the article purchased did not come under the head of canned goods. The argument of the cases²³⁹ that held that no warranty was implied in the sale of canned goods by a dealer who was not the manufacturer, would seem to apply with the same force whether the Sales Act was adopted or not, which can also be said of the reasoning of the decisions which have refused to make such an exception.²⁴⁰

This leaves only the situation in which the buyer makes his own selection. It is intimated in a Massachusetts case²⁴¹ that this court will follow its rule, announced before the adoption of the Act that if the buyer makes his own selection no warranty of wholesomeness will be implied. Since this is so clearly not in harmony with the trend of the American cases on this subject, we may expect that it will not be followed elsewhere unless necessarily required from the wording of the statute. This depends upon whether we must say that when the buyer makes his own selection he does not trust to the skill and judgment of the dealer to provide wholesome food. As previously suggested it is reasonable to suppose that he trusts to the seller to provide only wholesome food, making his own selection to gain advantages of an altogether different nature. It is submitted that the buyer who makes his own selection would change his dealer if he considered this precaution necessary to prevent being poisoned by impure provisions.

One doubt thrown by the wording of the Act upon this phase of the situation must not be overlooked. Under the section dealing

²³⁷ "There arises inevitably the implication that the plaintiff made known to the defendant that he was purchasing the beans for consumption as food". *Ward v. Great Atlantic & Pacific Tea Co.*, (1918) 120 N. E. (Mass.) 225, 226.

²³⁸ *Gearing v. Berkson*, (1916) 223 Mass. 257; *Ward v. Great Atlantic & Pacific Tea Co.*, (1918) 120 N. E. (Mass.) 225; *Friend v. Childs Dining Hall Co.*, (1918) 120 N. E. (Mass.) 407.

²³⁹ See notes 121 to 128 incl.

²⁴⁰ See notes 133 to 140 incl.

²⁴¹ *Ward v. Great Atlantic & Pacific Tea Co.*, *supra*, p. 226.

with implied warranties of quality²⁴² it is expressly set forth that "in the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose." We may suppose that a man steps into a retail store and says, "I am troubled with carbon in my car. Have you any preparation that will remove it?" Thereupon the dealer promptly hands him Johnson's Carbon Remover. While the article so sold has a "patent or trade name", this transaction was not a sale of it under that name, nor is there any reason why the mere fact that the article has a trade name should exclude the implied warranty that it would remove carbon. On the other hand, the buyer might expressly call for Johnson's Carbon Remover. We might even suppose that the dealer attempted to sell him another preparation, but he would have Johnson's and none other. It is obvious that the act imposes no warranty upon the dealer that the article sold will remove carbon when the transaction is of this nature. Between these two situations we might introduce varying shades of difference according to the actual conversation and conduct of the two parties. Yet the problem would seem to turn upon the question of whether the transaction was a sale of carbon remover which happened to be Johnson's, or was a sale of Johnson's Carbon Remover. Substitute then for this commodity, Royal Baking Powder. Will the same principles apply there? If it is wholly a problem of the "intricacies of the law of sales" the result will be the same, but if, as seems to be true, the provision dealer's liability, though originally worded in terms of warranty, is really an insurer's liability, this would not necessarily follow. For as previously indicated, and as will be further discussed under the head of pure food legislation, the tendency in this country today is altogether in the direction of placing upon those who make a business of supplying food to the public, the absolute duty of seeing to it that no unwholesome or poisonous food is furnished by them. To ground the responsibility, arising out of the failure of this duty, entirely upon the intricacies of sales and warranties would be reactionary in the extreme, contrary to the principles underlying the pure food laws and not called for by the provisions of the Sales Act. It should be pointed out that the sub-section quoted is by no means limited to warranties by a dealer, the wording being that "there is no implied warranty as to its fitness for any particular purpose". The trend of the law is such that there need be no hesitation in saying that

²⁴² Sec. 15. The reference is to sub-section (4).

the manufacturer of foodstuffs, intended directly or indirectly for public consumption, will not be permitted to immunize himself from the responsibility placed by law upon such a person, by the mere adoption of a patent or trade name. But this must be because this liability of such manufacturer is something different than a mere problem of implied warranty. Coming back to the sale by a dealer it would seem quite reasonable for the law to hold the dealer strictly responsible for wholesomeness of the food sold by him except in instances such as the one mentioned in which the transaction was essentially a sale of Royal Baking Powder as distinguished from a sale of baking powder that happened to be Royal merely for the reason that the dealer filled the order in that manner. Such an exception would seem fair to the dealer, but if extended to every sale of an article that has a "patent or trade name" it would unwisely open the way for the dealer to "push" questionable articles merely because there might be a greater profit to him with no responsibility attached. Since the tendency is to dissociate this problem from the rules of implied warranty, it is not suggested that this sub-section of the Sales Act will necessarily introduce such an exception, but merely that one to the extent mentioned might be reasonable. What course the decisions will take remains to be seen.

Passing to transactions between dealers, it would seem that if such a buyer has an opportunity to inspect the goods he would rely upon his own judgment rather than upon that of the seller,²⁴³ while if the nature of the transaction was such as to preclude examination by him, he would trust to the seller's skill.²⁴⁴

Thus it appears that although the statute mentions no rules of warranty peculiar to sales of food, its language is such that, coupled with a well established rule founded upon so important a principle as the "high regard for human life", each state will probably conclude, in regard to its own decisions under the common law, that this "statute is in substance, so far as concerns a dealer such as the defendant [i. e., a dealer of provisions], simply a codification of the common law."²⁴⁵ But our theory of working out the solutions to these problems by emphasizing the need of guarding the lives and health of the community will be shoved largely into the background

²⁴³ But if the sale is by sample there is an "implied warranty that the goods were free from any defect, rendering them unmerchantable, which was not apparent on reasonable examination of the sample." *Stewart v. Voll & Son*, (1911) 81 N. J. L. 323, 324.

²⁴⁴ *Pentland v. Jacobsen*, (1915) 155 N. W. (Mich.) 468.

²⁴⁵ *Ward v. Great Atlantic & Pacific Tea Co.*, *supra*, at p. 226.

by the English notion of "reliance by the buyer" if the situation is to rest entirely upon "the intricacies of the law of sales". We have already discovered, however, a tendency to place the matter upon a broader footing, which tendency will doubtless be augmented by giving wider influence to the pure food laws.

An Oregon case²⁴⁶ has said that such statutes are not intended "to punish persons innocently selling diseased food products where the defects are latent and not known at the time of the sale." But this is not in accord with either our principle of "high regard for human life" or the trend of the decisions in this country. The clearest statement of both of these is to be found in a Minnesota case,²⁴⁷ where it is said that

"This statute is intended to protect the health of all of the people of the state. Clearly the plaintiff belongs to the class for whose benefit the statute is intended.

"The complaint and the findings of fact of the trial court bring this cause within the rule that where a statute for the protection or benefit of individuals prohibits a person from doing an act, or imposes a duty upon him if he disobeys the prohibition or neglects to perform the duty, he is liable to those for whose protection the statute was enacted for damages resulting proximately from such disobedience or neglect. Negligence is implied from a violation of the statute. *Bott v. Pratt*, 33 Minn. 323, 23 N. W. 237, 53 Am. 47; *Baxter v. Coughlin*, 70 Minn. 1, 72 N. W. 797. The plaintiff's injuries in the case resulted proximately from the defendant's failure to comply with the statute, for it sold the impure oil to the plaintiff's grocer, knowing that in the regular course of his business it would be sold to his customers for use in cooking their food. . . . The fact that the trial court did not find that the defendant knew that the oil was impure does not affect the question of its liability; for it was bound to know whether the article, which it sold to be retailed to the customers of the purchaser for food purposes, was sound, wholesome, and complied with the statute. This is a salutary and necessary construction of our pure food statute".

This, as is apparent from the quotation, is a decision holding the manufacturer liable to a sub-vendee who was injured by food that did not measure up to the statutory requirement. Other cases have made the same holding as to a sale by a dealer to a consumer²⁴⁸

²⁴⁶ *Swank v. Battaglia*, (1917) 84 Or. 159, 166.

²⁴⁷ *Meshbesh v. Channellene Oil & Mfg. Co.*, (1909) 107 Minn. 104, 108.

²⁴⁸ *Sloan v. F. W. Woolworth Co.*, (1915) 193 Ill. App. 620, saying on p. 625: "Since the opinion was rendered in the *Wiedeman* case, the Pure Food Statutes were passed in 1907. . . . These statutes are police regulations in the interest of public health, and do not make knowledge by the retailer a necessary element of the offense. The question whether lack of knowledge by the retailer of the impure or tainted condition of such goods was or was not a defense to an action for damage under the Federal Pure Food Law was passed

and even as to sales between dealers.²⁴⁹ It is clear that with such a statute, interpreted in this way, there will be an end to such holdings as that in *Gearing v. Berkson*²⁵⁰ in which a woman who was injured by eating unwholesome pork chops which she had purchased of a dealer, was denied any recovery against that person on the ground that in making the purchase she had really acted as the agent of her husband and consequently did not have the benefit of any implied warranty since that arises in favor of the vendee only. That is, it makes such a dealer really an insurer of the quality of the food he sells.

CONCLUSION

Quite the contrary of this, and it is submitted, quite unsound, is the dictum²⁵¹

"that protection to the public lies not so much in extending the absolute liability of individuals, as in regulating lines of business in which the public has a particular interest in such a way as reasonably to insure its safety. In other words, pure food laws, and rigorous inspection of meats, canning factories, and other sources of food supply, would seem to me a much more effective way of protecting the public than by the imposition of the liability of an insurer upon those who furnish food."

The fallacy of this argument is that it starts with the assumption that the two modes of protection are necessarily inconsistent, so that one must be adopted to the abandonment of the other. Nothing could be further from the truth, as is evidenced by the decisions²⁵² which have used pure food statutes to make more plain the "insurer's liability" of those who make it their business to supply the public with food. Furthermore, it is not at all true, as intimated in a part of the dictum not quoted, that "insurer's liability" does not tend to correct the evil at its source. In fact the imposition of such a liability is usually more for the purpose of stimulating such great care that the injury will be avoided than of adjusting the rights of parties after the damage is done. The latter

upon and held not to be a defense in *United States v. Sprague*, 208 Fed. 419. . . . A civil action for injuries caused by a violation of public policy statutes will lie although the statute may not in terms give a civil right of action. *Purtell v. Philadelphia & E. Coal & Iron Co.*, 256 Ill. 110; *Streeter v. Western Wheeled Scraper Co.*, 254 Ill. 244."

²⁴⁹ *Neiman v. Channellene Oil & Mfg. Co.*, (1910) 112 Minn. 11.

²⁵⁰ (1916) 223 Mass. 257.

²⁵¹ Of Hand, J., in *Valeri v. Pullman Co.*, (1914) 218 Fed. 519, 521.

²⁵² See notes 246, 247 and 248.

result is accomplished, it is true, but chiefly as a means of effecting the former.

In this field one of two theories must be true. Either the business of supplying food to the public can be so conducted that injuries from the sale or service of unwholesome food will be entirely eliminated, or it is a necessary incident to the conduct of such business that some impure food will be furnished to consumers. If it is admitted that with sufficient care all such injuries can be prevented, there is no doubt that considerations of the life and health of the public demand that such care be employed. Hence if this premise be accepted the mere fact that unwholesome food was furnished by a "dealer" will establish a failure by him to use due care under the circumstances. If we reject this premise and conclude that the putting of some unwholesome food on the market is a necessary incident to the conduct of this business, the same liability should be imposed, though on a different theory, because²⁵³

"today there is a strong and growing tendency to revive the idea of liability without fault, not only in the form of wide responsibility for agencies employed, but in placing upon an enterprise the burden of repairing injuries without fault of him who conducts it, which are incident to the undertaking."

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²⁵³ Pound, "The End of Law", 27 Harv. L. Rev. 195, 233. See also 4 Iowa Law Bulletin 113.

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RECENT CASES

ADVERSE POSSESSION—ADVERSE CLAIM OF LIFE TENANT—NOTICE TO REMAINDERMAN.—When a widow having a life estate in certain property died, her heirs claimed she had acquired a fee to the property by virtue of adverse possession because she had in certain leases used words indicating absolute ownership in herself, and had included in them a proviso that they terminate in case of a sale of the land. The remaindermen lived at a distance and had no notice of such claims until this action was brought to quiet title. Held, the statute of limitations does not begin to run in favor of a life tenant who claims the entire estate in his own right, as against the remainderman, until such claim of the life tenant is clearly brought home to the remainderman. *Anderson v. Miller*, 173 N. W. 688. (Neb. Sup. Ct.)

Future interests constitute a great obstacle to quieting title in realty. The general rule is that the statute of limitations does not commence to run against a remainderman until the termination of the preceding estate. 16 Cyc. 659. This difficulty has been obviated in Iowa and Nebraska by judicial construction of statutes giving any person who claims an interest in real property a right to maintain an action against any person who claims the title thereto. Iowa Code, §4223; Neb. Rev. Stat. 1913, §6266. Because a remainderman has this action to quiet title it has been held that the statute begins to run against him when he knows of the adverse

holding. *Criswell v. Criswell*, 101 Neb. 349, 163 N. W. 302, L. R. A. 1917E 1103, and this doctrine has been extended to cases involving an alienation in fee by the life tenant. *Murray v. Quigley*, 119 Iowa 6, 92 N. W. 869; *Crawford v. Meis*, 123 Iowa 610, 99 N. W. 186; *Garrett v. Alford*, 152 Iowa 265, 132 N. W. 379; *Wenger v. Thompson*, 128 Iowa 750, 105 N. W. 333; *Nevelier v. Foster*, 173 N. W. 879.

The principal case involves a disclaimer by the life tenant. It formerly was the law that a disclaimer started the statute running against a remainderman at once instead of after the termination of the life estate. *Fortier v. Ballance*, 5 Gilman (Ill.) 41. As pointed out in REEVES ON REAL PROPERTY, Vol. 2, §640, this placed the remainderman in a hard dilemma in that he was forced to sue for possession of the land within the statutory period, or else lose his right of entry, while if he did sue he lost the benefit of the residue of the particular estate. There has been a tendency, however, to recognize this hardship with the result that the remainderman may bring his action for possession at once if he chooses or may wait until the life estate has terminated. But if he does not bring his action at once the statute will not begin to run against him until the life estate has ended. In other words the landlord may elect to be disseised at the time when the disclaimer is attempted or may ignore the disclaimer until such time as his right of entry accrues. REEVES ON REAL PROPERTY, *supra*.

Under the construction of the Iowa and Nebraska statutes mentioned above, which give a right of action to quiet title, it has been held that the statute commences to run against the remainderman from the time that he knows the possessor claims the entire estate in his own right. *Criswell v. Criswell*, *supra*; *Lyons v. Carr*, 77 Neb. 883, 110 N. W. 705; *Holmes v. Mason*, 80 Neb. 450, 114 N. W. 606, 115 N. W. 770. This places the remainderman in no dilemma for it does not require or even entitle him to sue for possession but merely requires him after he has notice of an adverse claim to bring his action to quiet his title. He does not lose the benefit of the particular estate and can suffer only from his own laches. So it would seem that no particular hardship is involved. The general effect then of this construction of the statutes giving an action to quiet title is revolutionary in that it prevents future estates from keeping titles in dispute and there is no objection to it such as was pointed out by Reeves to the common law doctrine.

CARRIERS—LIABILITY FOR LOST BAGGAGE—LIMITATION OF LIABILITY.—The plaintiff, a peddler, checked a grip which the defendant's baggage agent knew contained merchandise. The grip was lost in transit. The defendant company had filed with the Minnesota Railroad Commission a schedule of rates which provided that the value of baggage up to and including one hundred and fifty pounds should be deemed and agreed not to be in excess of \$100. A notice of limitation of liability to this amount was printed on the baggage checks. The defendant claimed it was only liable for \$100,

basing its contention on the fact its liability was fixed at that amount in the filed schedule of tariffs and in the notice printed on the baggage checks. Held, the plaintiff is entitled to recover the full value of the lost baggage. *Ferris v. M. & St. L. Ry. Co.*, 173 N. W. 178. (Minn. Sup. Ct.)

The carrier's liability for baggage is the same as that for goods carried for hire. *Wells v. Gt. Northern Ry. Co.*, 59 Or. 195, 114 Pac. 92, 34 L. R. A. (N. S.) 18. And while a carrier may refuse to carry merchandise as baggage, still, if it knows or has good reason to suspect the character of the goods and accepts them as baggage it will be responsible for them as such. *Bergstrom v. C. R. I. & P. Ry. Co.*, 134 Iowa 223, 111 N. W. 818, 10 L. R. A. (N. S.) 1119; 5 R. C. L. 164. But if the passenger knows the carrier has a regulation against accepting such property as baggage he cannot hold the carrier for the value of the merchandise even though the agent knowing the character of the proffered baggage accepts and checks it. *Weber v. Ry.*, 113 Iowa 188, 84 N. W. 1042.

In the principal case, however, the defendant admitted liability but claimed it had effectively limited it. That raises the question, can a carrier limit its liability. In the United States the general rule is that a carrier can by special contract limit its liability for losses not resulting from misconduct or negligence. *York Co. v. Central Ry.*, 3 Wall. 107, 18 L. Ed. 170. See article by R. M. Perkins, 3 Iowa Law Bulletin 211. And under Federal Statutes requiring interstate carriers to file a schedule of tariffs with the Interstate Commerce Commission, the Supreme Court of the United States has held that limitations to an agreed valuation for the purpose of fixing a rate charge are valid on the grounds of estoppel, for the shipper is presumed to have knowledge of the rates so filed. *Wells Fargo & Co. v. Neiman Marcus Co.*, 227 U. S. 469, 57 L. Ed. 600.

But the *Ferris* case was one involving only intrastate carriage and the Minnesota court took the view that the Federal rule of estoppel applied only to interstate shipments. So, since by the law of Minnesota a carrier could only limit its liability by a special contract that was reasonable and fairly made, it would be necessary for the railroad company to show such a contract. That brought up the question, is a baggage check a contract. The Minnesota court held it was merely a receipt. Accord, *Isaacson v. N. Y. Cent. & Hudson R. Ry.*, 94 N. Y. 278, 46 Am. Rep. 142. Being a receipt a baggage check is nothing more than a notice and a notice will not limit a carrier's liability unless the passenger assents to it. *York Co. v. Central Ry.*, *supra*. Accordingly any notice of a limitation on the check must be assented to by the passenger. *Hell v. Adams Express Co.*, 82 N. J. L. 373. The Minnesota court refused to presume this assent. But in *N. Y. Cent. v. Beaham*, 242 U. S. 148, 151, 61 L. Ed. 210, a case under the Federal Statute and concerning interstate carriage, a check was said to be *prima facie* a contract and the assent of the passenger is presumed from his acceptance of it. And in Iowa a baggage check was said to be some evidence of a

contract for the transportation of baggage. *Peterson v. Ry. Co.*, 80 Iowa 92, 49 N. W. 573.

But whatever the law may be as to limitation of a carrier's liability in other states, in Iowa, by statute, Code §2074, a carrier is prohibited from limiting his common law liability in any manner. Accordingly, it was held that a contract limiting a carrier's liability for loss of baggage was invalid. *Davis v. Ry.*, 83 Iowa 744, 49 N. W. 77. As to interstate commerce, however, §2074 now has no application. *Baldwin & Riggs v. Ry.*, 173 Iowa 524, 156 N. W. 17. For Congress, by the Carmack Amendment, part of the Hepburn Act of 1906, took supreme control of a carrier's liability as to interstate shipments and superseded all state regulations. *N. Y. Central v. Beaham*, *supra*. And in a recent case of interstate shipment a limitation of liability according to a schedule of tariffs filed with the Interstate Commerce Commission was held valid even though the carrier was guilty of conversion and so had failed in its duty. *Richter v. American Express Co.*, 180 Iowa 1037, 164 N. W. 228.

For a study of the scope and interpretation of the Federal legislation as to limitations of a carrier's liability see the article by R. M. Perkins in 4 Iowa Law Bulletin.

EVIDENCE—MEMORANDUM OF PAST EVENTS—AUTHENTICATION NECESSARY TO RENDER ADMISSIBLE.—In a prosecution for perjury, the state alleged the prisoner's absence from the place where the acts took place of which he had testified in a previous trial, and offered in evidence an account book left by the witnesses purporting to show that the defendant had taken meals with them during the time specified and at a place different from that where the acts occurred. No evidence was given to show an independent recollection of the making of the entries by the witnesses (husband and wife), a recognition of the handwriting in which they were made, or that they represented the witnesses' own knowledge and recollection at the time. Held, that the memorandum was inadmissible. *State v. Easter*, 170 N. W. 748. (Iowa Sup. Ct.)

The courts are not in accord on the admissibility of memoranda in evidence under all circumstances. All agree that the witness may refresh his memory by reference to a memorandum made at about the time when the matter about which he testifies occurred, but in such cases, the witness' own statement and not the memorandum is the evidence, as he testified from actual memory after reference to the writing. *Comm. v. Flynn*, 165 Mass. 153, 42 N. E. 562; *Heenan v. Forest City Paint Co.*, 138 Mich. 348, 101 N. W. 806; *State v. Hassan*, 149 Iowa 518, 128 N. W. 960. The great weight of authority is that the witness, under certain restrictions, may testify from memorandum to facts which he once knew but of which he has no present recollection. *Insurance Co. v. Weides*, 14 Wall. 329 (U. S.); *Acklen v. Hickman*, 63 Ala. 498; *Curtis v. Bradley*, 65 Conn. 49, 31 Atl. 591. Some early cases in New York refused to allow the use of memoranda of past recollection, *Lawrence v. Barker*, 5 Wend. 301; *Feeter v. Heath*, 11 Wend. 479, 486, but such memoranda are

now admitted where the lack of present recollection is proved. *Russell v. Ry. Co.*, 17 N. Y. 134.

But a memorandum of a past recollection is only admissible in evidence where the witness can show it was made when his actual recollection was "fairly fresh", *Williams v. Kelsey*, 6 Ga. 324; and can guarantee its accuracy, *Acklen v. Hickman*, *supra*; *Misner v. Darling*, 44 Mich. 438, 7 N. W. 211; *Furlong & Meloy v. Insurance Co.*, 136 Iowa 468, 113 N. W. 1087. The cases do not require that the witness recollect the making of each particular entry appearing in the memorandum or any present recollection of the facts recorded, since such would be practically impossible, amounting to an exclusion of memoranda, especially accounts and records covering a long period of time, *Shove v. Wiler*, 18 Pick. 558. But they do require some assurance as to the authenticity of the record. The witness must guarantee the correctness of the memorandum by affirming in his testimony that it accurately states his past recollection of the facts and that he knew it to be true when made. *Ins. Co. v. Weides*, *supra*; *Graham v. Dillon*, 144 Iowa 82, 121 N. W. 47; *Misner v. Darling*, *supra*. This he may be able to do by showing a custom of making records in the usual course of business, *Williams v. Kelsey*, 6 Ga. 365, 374; *Morris v. Sargent*, 18 Iowa 90, 95; or by special circumstances indicating the correctness of the memorandum. *Owens v. State*, 67 Md. 307. It is also generally held that a bare recognition of the handwriting by the witness will be sufficient to support his declaration that it was true when made. The witness may state that he recognizes the handwriting as his own and swear that he would not have written it unless he knew its contents to be true, although he does not remember the making of the writing or any other circumstance from which he could guarantee its accuracy. *Haven v. Wendell*, 11 N. H. 112; *Clute v. Small*, 17 Wend. 237; *contra*, *Parsons v. Insurance Co.*, 16 Gray 463.

Iowa decisions are in accord with the general rules as above stated. *Furlong & Meloy v. Insurance Co.*, 136 Iowa 468, 113 N. W. 1087; *Bradley v. Chesebrough*, 111 Iowa 126, 82 N. W. 472; *Edwards v. City of C. R.*, 138 Iowa 421, 116 N. W. 323; *Graham v. Dillon*, 144 Iowa 82, 121 N. W. 47; *Worez v. Des Moines Ry. Co.*, 175 Iowa 1, 156 N. W. 867; *State v. Brady*, 100 Iowa 191, 69 N. W. 290. Some doubt arose in earlier cases as to whether the memorandum itself could be read in evidence, *Taylor v. R. R. Co.*, 80 Iowa 431, 46 N. W. 64; *Adae v. Zangs*, 41 Iowa 536; but this has been removed by the case of *State v. Brady*, *supra*, where it was held on the authority of *Curtis v. Bradley*, 65 Conn. 99, 31 Atl. 591, that since the witness may read from the memorandum in giving his testimony, there is no reason for excluding the memorandum itself. The Iowa cases have consistently required that the witness be able to guarantee the accuracy of the memorandum, and to swear that he knew it to be true when made, *State v. Brady*, *Graham v. Dillon*, *Worez v. Des Moines Ry. Co.*, *supra*.

In the case under discussion the witnesses did not testify that the entries in the account book were correct, and could not even recog-

nize the handwriting. From the case it appears there were facts from which the witnesses could have testified that the memorandum was true when made, and made in the regular course of business. Such a regular course of business has been held to justify a declaration on the part of the witness that the writing accurately states a recollection which he once had, but the failure to make such a declaration in this case was fatal to the admissibility of the memorandum.

EXECUTION—SALE ON EXECUTION—VACATING SALE FOR INADEQUACY OF CONSIDERATION.—This was an action to set aside a sale of the plaintiff's property on execution. The plaintiff owned an undivided one-tenth share of 513 acres of land made up of 40-acre tracts and lots of the government survey. To satisfy a judgment of \$102.15 and costs the plaintiff's interest in the entire tract was sold to the defendant for \$142.82. Such interest was worth from \$6,000 to \$10,000. Held, that the sale should be set aside. *Glenn v. Miller*, 173 N. W. 135. (Iowa Sup. Ct.)

The rule as generally stated is that a judicial sale will not be set aside because of mere inadequacy of consideration, unless the inadequacy is so gross as to shock the conscience and raise a presumption of fraud, unfairness, or mistake. *Graffam v. Burgess*, 117 U. S. 180, 29 L. Ed. 839; *First National Bank of Omaha v. Hunt*, 101 Neb. 743, 165 N. W. 139; *Sheppard v. Enright*, 188 S. W. (Mo.) 186. This statement has found repeated expression in the Iowa cases. *Sigerson v. Sigerson*, 71 Iowa 476, 32 N. W. 462; *Peterson v. Little*, 74 Iowa 223, 37 N. W. 169; *Jonas v. Weires*, 134 Iowa 47, 111 N. W. 453. There has been great reluctance to set aside a judicial sale on the sole ground of inadequacy of price. But when it is determined that the price is grossly inadequate, all courts have most assiduously searched for slight evidence of fraud, unfairness, mistake, or irregularity in the conduct of the sale. If any such evidence is adduced the sale is invalidated. Inadequacy of price is a circumstance pointing to fraud and only slight corroborating evidence of fraud or unfairness is necessary to invalidate the sale. *Stevenson v. Gault*, 131 Ark. 397, 199 S. W. 112; *Durham v. Elliott*, 180 Ky. 724, 203 S. W. 539; *Drake v. Brickner*, 180 Iowa 1172, 163 N. W. 597. Gross inadequacy in connection with mistake, or with circumstances showing the judgment debtor's excusable ignorance of the time and place of the sale is a basis for relief. *Hintze v. Stingel*, 1 Md. Ch. 283; *Odell v. Cox*, 151 Cal. 70, 90 Pac. 194. A frequently recurring ground for setting aside a judicial sale is a gross inadequacy of price in connection with irregularities in the conduct of the sale. *Graham v. Causler*, 191 S. W. (Tex.) 856; *Olp v. Meyer*, 277 Ill. 202, 115 N. E. 221; *Conroy v. Carroll*, 82 Md. 127, 33 Atl. 423.

In the present case there was an excessive levy, for although the plaintiff's interest in a divisible part of the land would have been sufficient to satisfy the judgment the sheriff sold his interest in the entire tract. There was also an abuse of discretion in failing to

postpone the sale when the price offered was inadequate, as provided by Code §4029. It therefore comes within the classification of cases in which the sale is set aside because of gross inadequacy of consideration in connection with irregularities in the conduct of the sale.

As previously stated the courts hesitate to grant relief on the sole ground of inadequacy. But there are some cases which squarely decide that gross inadequacy without any aggravating circumstances is sufficient ground for setting aside a sale. *Lankford v. Jackson*, 21 Ala. 650; *Cummins v. Little*, 16 N. J. Eq. 48; *Beatty v. Vean*, 18 W. Va. 291; *Mangold v. Bacon*, 237 Mo. 496, 141 S. W. 650. These cases proceed upon the theory that the inadequacy is sufficient evidence of fraud to invalidate the sale without additional proof from other circumstances. In the cases where no circumstance other than inadequacy is shown the decisions are irreconcilable. In the Missouri case just cited the selling price was \$12.50 and the value \$1200. The sale was set aside. In an Illinois case the price was \$10 and the value \$4000, and the validity of the sale was affirmed. *O'Callaghan v. O'Callaghan*, 91 Ill. 228.

HUSBAND AND WIFE—ABANDONMENT—SALE OF EXEMPT PROPERTY BY DESERTING HUSBAND.—The defendant's husband wrongfully abandoned her and left the State, leaving only exempt personal property in her possession. The husband then executed a bill of sale for this property to his father, the plaintiff. Action was brought by the vendee for possession of the property under this bill of sale. Held, *Stevens and Salinger, J. J.*, dissenting, that defendant was entitled to retain the property. *Holdorf v. Holdorf*, 171 N. W. 42. (Iowa Sup. Ct.)

The exemption of certain property from execution by creditors does not prevent the debtor from selling that property. *Pearson v. Quist*, 79 Iowa 54, 44 N. W. 217. Where the husband absconds, such property as would have been exempt to him, is exempt in the hands of his wife or children. Code, §4016. The deserted wife may also obtain authority from the court "to manage, control, sell, and encumber" the husband's property for the support and maintenance of the family and for the purpose of paying debts. Code §3158. This latter Code provision does not deprive the deserted wife of her common law right of selling personal property left in her hands, in order to support herself and family. *Rawson & Rice v. Spangler*, 62 Iowa 59, 17 N. W. 173; *Waugh v. Bridgeford*, 69 Iowa 334, 28 N. W. 626. If the husband deserts his wife, she is at once clothed with a right of homestead under a statute which provides that, "in case the husband or wife desert his or her family, the exemption shall continue in favor of the one occupying the premises as a residence". *Randleman v. Randleman*, 118 Ill. 257, 8 N. E. 773; *Lynn v. Sentel*, 183 Ill. 382, 55 N. E. 838, 16 L. R. A. (N. S.) 114. Although Iowa does not have such statutory provisions for exempt realty, the principal case goes further and extends this immunity from alienation to exempt personal property. This

result is undoubtedly influenced by the fact that "exemption laws are not intended simply for the protection of the debtor, but primarily for the protection and support of his family, and to that end the statute will be liberally construed". *Schooley v. Schooley*, 169 N. W. 56. (Iowa Sup. Ct.) One of the majority opinions in the principal case contends that it is impossible to give effect to these laws unless "it be held that as a matter of law the dominion and trusteeship of the exempt property passes from the absconding husband to the deserted wife and children". Does this mean that title passes to the wife and children? In *Malvin v. Christoph*, 54 Iowa 562, 7 N. W. 6, our Supreme Court said that "the law authorizes the wife or children to claim the exemption, not as the owners of the property, but for him for the benefit of his family". If the husband returns to his family, will the vendee be entitled to this property under his bill of sale? The result in the principal case is certainly a desirable one. This was conceded by the dissenting judges, who believed the subject to be one for treatment by the legislature, but that the court was not entitled to give what seemed to them an undue extension of existing statutes. An opposite result seems to have been reached in a similar case of *King v. King*, 41 Tex. Civ. App. 473, 91 S. W. 633.

LIBEL AND SLANDER—PRIVILEGED COMMUNICATIONS—LIABILITY OF TELEGRAPH COMPANY.—The defendant company received from a stranger, at its office, a message wherein the plaintiff was charged with adultery. The telegram was relayed over the wires of another company and necessarily read by at least three other operators. In an action brought by the plaintiff for libel, the defendant claimed the message was privileged. Held, that the message was privileged if the defendant's operator acted carefully and in good faith in sending, and the question of malice and negligence was for the jury. *Paton v. Great Northwestern Telegraph Co.*, 170 N. W. 511. (Minn. Sup. Ct.)

The publication here was actionable clearly unless privileged, since it was, as the court puts it, "glaringly defamatory", and publication to telegraph employees is sufficient to make out a case. *Williamson v. Freer*, L. R. 9 C. P. 393; *Munson v. Lathrop*, 96 Wis. 386, 71 N. W. 596. Malice in fact or "express malice", is unnecessary to make out a prima facie case of libel since, as cases say, "malice is inferred without proof." Mere publication of defamatory matter not privileged is sufficient to support the action. *Hulton v. Jones*, [1909] A. C. 20; *State v. Cooper*, 138 Iowa 516, 116 N. W. 691; *Brandt v. Story*, 161 Iowa 451, 143 N. W. 345. In some respects a telegraph company is in a position similar to that of a newspaper in that both telegraph company and newspaper are engaged in transmitting information in which they have no other concern but the profit to themselves in the transmission, yet it is always held that a newspaper, simply because it is a newspaper, has no more privilege than an ordinary person. *Morse v. Times Printing Co.*, 124 Iowa 707, 100 N. W. 867. But a telegraph com-

pany differs from a newspaper in that it is required by law to transmit all proper messages. *West. U. T. Co. v. Ferguson*, 57 Ind. 495; *Markley v. West U. T. Co.*, 151 Iowa 612, 132 N. W. 37; and so it is not liable for publication of a message couched in proper language and not defamatory on its face. *Peterson v. West. U. T. Co.*, 65 Minn. 18, 67 N. W. 646; *West. U. T. Co. v. Cashman*, 132 Fed. 805. The telegraph operator, it is said, may use his own judgment as to whether a message is or is not defamatory, and his employer will not be liable for any mistake in judgment made in good faith. *Nye v. West. U. T. Co.*, 104 Fed. 628.

The telegraph company, however, is not required to commit crimes or torts. The rule is well settled that it is not required to accept obscene matter for transmission, *Nye v. West. U. T. Co.*, *supra*; *West U. T. Co. v. Lillard*, 86 Ark. 208, 110 S. W. 1035; nor is it required to accept any matter which on its face would tend to subject the company to a criminal prosecution, *Louisville v. Wehmhoff*, 116 Ky. 812, 76 S. W. 876; or render it liable in a civil action. *Peterson v. West. U. T. Co.*, 65 Minn. 18, 67 N. W. 646; *Gray v. West. U. T. Co.*, 87 Ga. 350, 13 S. E. 562. Thus the telegraph company would seem to be protected in refusing to accept defamatory messages since they would tend, as in the instant case, to subject the company to a civil action. But then the question arises as to libellous messages, privileged because of peculiar circumstances unknown to the operator. Ordinarily, the latter is not required nor authorized to make inquiries of the sender concerning the contents of the message for to do so would greatly impair the services rendered. *Peterson v. West. U. T. Co.*, *supra*; *Grisham v. West. U. T. Co.*, 142 S. W. 271. To require the company to delay the transmission of important, privileged, though defamatory messages until a clerk had satisfied himself of the fact of privilege, would be undesirable. And then suppose the clerk in his search discovers facts which he thinks establish privilege, but which in law are insufficient. Shall the company answer for the mistakes of law made in good faith by their employees? The federal court in the case of *Nye v. West. U. T. Co.*, *supra*, has offered a possible solution in the rule that the company will not be liable for transmitting a defamatory message if the operator has no reason to suspect that defamation was intended by the sender. But such a rule is obviously too broad as operators in the ordinary course of business have little personal interest in the contents of messages received and would almost never have reason to suspect an intent to defame. In considering the liability of the telegraph company for sending defamatory messages it is well to bear in mind the small amount of publication involved; the mechanical nature in which the messages are received and transmitted, the character of the business of admitting of no delay, and the legal requirement to accept all proper messages. Such considerations should incline the courts to leniency in the development of rules governing the transmission of libellous telegrams.

NEGLIGENCE—IMPUTED NEGLIGENCE—JOINT ENTERPRISE—WHAT CONSTITUTES JOINT ENTERPRISE.—Decedent proposed to a third party who had the management of an automobile that they take a drive. Mutual pleasure was their sole object. Decedent entered the car upon his own suggestion, and thereafter directed the route to be taken. Through negligence of the defendant city in the maintenance of its roadway, and the concurrent negligence of the driver, decedent lost his life. Held, these facts would not sustain a jury finding of joint enterprise. *Cram v. City of Des Moines*, 172 N. W. 23. (Iowa Sup. Ct.)

Courts generally, the Iowa court as well, have repudiated the doctrine of imputed negligence. To disentitle a plaintiff from recovery because a third party's negligence, as well as that of the defendant have combined to cause an injury, an agency relation must exist, or there must be a joint enterprise. Contributory negligence of one will bar all parties to a joint enterprise, if the negligence be within the scope of the undertaking. For a discussion of these rules, and for authorities, see 1 Iowa Law Bulletin, pp. 50 and 202; 2 Iowa Law Bulletin 99.

What is a joint enterprise? No one answer seems forthcoming. Clearly, the relation of master and servant is not a joint enterprise. Nor is the relation of fellow servants, *Grace v. Minneapolis & St. Louis R. Co.*, 153 Iowa 418, 133 N. W. 672; *McBride v. Des Moines City Ry. Co.*, 134 Iowa 398, 109 N. W. 618; *Waters v. Metropolitan Street R. R.*, 85 N. Y. Supp. 1120; *Scheib v. New York City R. Co.*, 100 N. Y. Supp. 986. Kinship and marital ties taken alone fail to establish such relation, *Fisher v. Ellston*, 174 Iowa 364, 156 N. W. 422. Likewise, the ownership of instruments employed or of a vehicle used does not make one a joint undertaker; see *Eline v. Western Maryland R. R.*, 262 Pa. St. 33, 104 Atl. 857, where a man riding in his own car under another's management was held not a joint undertaker.

The mere fact of persons doing the same thing together at the same time is not a sufficient test. Persons walking together are not identified as joint undertakers, *Barnes v. Marcus*, 96 Iowa 675, 65 N. W. 984. Taken a step further, the fact of riding together, the relation of host and guest, is not sufficient, *Withy v. Fowler*, 164 Iowa 377, 145 N. W. 923. Difficulty lies in deciding when a person is a guest and when a joint undertaker. A guide is provided here in "the power to control the means". Who does the inviting is an immaterial circumstance. Suggestion as to the route to be taken is unimportant as a test; see *Eline v. Western Maryland R. R.*, *supra*, where a party suggested the route, yet neither controlled nor had the power to control the manner of driving.

That the enterprise has in view an object in which the parties are mutually interested is not sufficient. A common object is not conclusive of a joint responsibility for the means employed. *McLaughlin v. Pittsburgh R. R.*, 252 Pa. St. 32, 97 Atl. 107; *Lawrence v. Denver R. R.*, 174 Pac. 817, appear to be wrongly decided on this point.

"Within the meaning of the law of negligence, common enterprise involves a community of interest in the objects and purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto", *Cunningham v. Thief River Falls*, 84 Minn. 21, 86 N. W. 763. "In the legal sense; in the law of negligence, joint enterprise refers to control and management", *Kessler v. Brooklyn Heights R. R.*, 38 N. Y. Supp. 299. These cases suggest the necessity of a distinction in the use of the word "joint enterprise", a distinction lucidly treated by the Iowa court, speaking through Ladd, C. J., in the case of *Lawrence v. Sioux City*, 172 Iowa 320, 154 N. W. 494. The court there says in effect that in all these cases where several act together for a common purpose, there is a joint enterprise, viz, that of riding together for pleasure, business, etc. But joint enterprise within the meaning of the law of negligence refers to the joint control and management of the parties; as expressed in the *Eline v. Western Maryland R. R.* case, *supra*, "the ability to dictate how the thing shall be done". That control here means the ability and power to control, though the power be not exercised, is familiar law. The exact situation must be inferred from the facts of each particular case. There seems to be little doubt that the principal case is sound in holding that there was no evidence of a joint enterprise.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACTS—RIGHT OF PERSON PAYING COMPENSATION AGAINST WRONGDOER.—One Whitney, employed by the Bernard Co., was injured while in the course of his employment, the injury being occasioned by the negligence of the defendant. The plaintiff surety company, having insured the employer against liability under the Workmen's Compensation Act, paid Whitney \$572.33 compensation under the Act. Whitney subsequently instituted an action for damages against the defendant and recovered \$2300 in that suit. The plaintiff now brings action against the railway, alleging the right of subrogation to Whitney's claim and seeks to recover the \$572.33 paid to Whitney as compensation. Held, the plaintiff is not entitled to recover. *Southern Surety Co. v. Chicago St. P. M. & O. Ry. Co.*, 174 N. W. 329. (Iowa Sup. Ct.)

Where the employee is injured under circumstances creating legal liability in some third person other than the employer to pay damages in respect thereof: "If the employé or beneficiary in such case recovers compensation under the Act, the employer by whom the compensation was paid or the party who has been called upon to pay the compensation shall be entitled to indemnity from the person so liable to pay damages as aforesaid, and shall be subrogated to the rights of the employé to recover therefor." Code Supp. §2477 m6(b). The court, in the course of its opinion, points out that the Compensation Act in no way affects the injured employee's common law action against the wrongdoer for damages. This view is unquestionably correct, for by Code Supp. §2477 m6(a) the employee may bring action against the third party wrongdoer to

recover damages and against his employer for compensation, but the amount of the compensation to which he is entitled under the Act is reduced by the amount of damages recovered. The principal case is a logical outcome of this, for the wrongdoer can only be subjected to the one action for damages and when the employee, after receiving compensation under the Act, also pursues his remedy against the wrongdoer and exhausts that liability, the subrogated party can maintain no action against the wrongdoer but must proceed against the workman to recover back the amount of compensation paid. Such an action must necessarily be devoid of returns where the employee, having no property, settles both claims out of court and squanders the money.

Practically all States adopting provisions for Workmen's Compensation have granted the right of subrogation to the employer where he pays compensation and the injury occurred under such circumstances as to create legal liability in third persons to pay damages. For collected statutes, see *BRADBURY ON WORKMEN'S COMPENSATION*. The great majority of States also allow the employee an election whether he shall pursue his remedy against the wrongdoer or accept compensation from his employer, but in some jurisdictions the choice made under the right of election is exclusive. Such a provision, as illustrated by the Kentucky statute (Laws 1914, c. 73, §68), removes all ambiguity in regard to the subject for it is there provided that the injured employee must elect which remedy he will pursue and if he elects to take under the Act his cause of action against the third party is assigned to the Workmen's Compensation Board for the benefit of the State Compensation Fund. By compelling the employee to give notice to the Board before suit is brought and forcing him to assign his claims to this Board, the situation as developed in the principal case could not arise.

While many of the States however have statutory provisions similar to those found in Iowa, a review of the authorities shows no case in point on facts with the principal case, which is evidently one of first impression.

SALES—RIGHTS OF BUYER—HOLDING PURCHASE PRICE UNDER ONE CONTRACT FOR DAMAGES SUSTAINED BY BREACH OF OTHER CONTRACTS BY THE SAME SELLER.—Defendant, a Minnesota retailer, ordered merchandise from time to time during the year 1916, from the plaintiff, a New York manufacturer. The plaintiff accepted these orders as they were made. Each contract provided that payment should be made within thirty days from date of invoice. The plaintiff, as found by the evidence, defaulted in not making deliveries within the time fixed or contemplated by the contracts. The defendant then withheld payment on past due invoices until the plaintiff should ship the goods due on unfilled orders, but stated that they were willing to let plaintiff ship goods from then on, draft with bill of lading. The plaintiff refused to ship any more goods on any terms until the defendant paid accounts past due. Plaintiff

did not send any more goods and sued to recover the amount of unpaid invoices. Defendant admitted the sale and the price but set up a counterclaim for damages for failure to deliver other merchandise which plaintiff had contracted to sell. Held, that the buyer was justified in withholding money due on account because of the seller's default, and that did not excuse seller from further performance. The court allowed the counterclaim. *Hjorth v. Albert Lea Machinery Co.*, 172 N. W. 488. (Minn. Sup. Ct.)

The Minnesota court seems to proceed on the theory that there was one blanket contract covering the whole course of dealing. Granted that it was one divisible contract, the failure of the buyer to pay for the installments when due was justified by the seller's delay in performance and did not relieve the vendor from making further installment deliveries. *Union Pressed Brick Co. v. Fultonham Brick and Drain Co.*, 112 Fed. 920, 50 C. C. A. 615; *Freeth v. Burr*, L. R. 9 C. P. 208. If the vendee's refusal to make the installment payment when due was "without excuse" that would relieve the vendor from making further installment deliveries. *Robson v. Palmer*, 27 Minn. 333, 7 N. W. 357, Uniform Sales Act (Laws 1917, c. 465), par. 45, (Gen. St. Supp. 1917, par. 6015-45). The refusal of the vendee, by the reason assigned for it, does not manifest an intention to repudiate the contract as a whole, in which case the vendor would be justified in refusing to go on with the contract. The vendee is not bound to treat the contract as at an end, by the delay in performance, but has an election either to treat the contract as at an end or go on with the contract and insist on performance of the rest by the vendor and bring an action for damages for the delay in the particular installments. Lord Blackburn says, "The vendee may accept the goods and bring his action for any damages he may have actually suffered in consequence of the late delivery. He does not by accepting the late delivery waive any claim he may have for damages arising from the delay." BLACKBURN ON SALES, (2nd ed.) 524. This rule is acknowledged in most of the American decisions. *Redlands Orange Growers' Ass'n v. Gorman*, 161 Mo. 203, 61 S. W. 820, and cases cited in note in 54 L. R. A. 718. In *Freeth v. Burr*, *supra*, the buyer's refusal to pay for the first installment, claiming a right to withhold to cover loss due to delay in delivery, was held not to be such a refusal on his part to comply with the contract as to set the seller free. That is a direct authority for the right of the buyer to withhold the purchase price of one installment to cover loss due to delay. But the buyer here was not asking even that much. All he was doing was holding that money as a guarantee for future performance. He was willing to waive all damages for past defaults, if at that late day his orders could be filled. The buyer clearly was within his rights in doing this and the seller in refusing to fill the remaining orders was guilty of a breach of contract under the above stated authorities.

But from the facts as stated in the opinion there appear to have been here independent orders from time to time, each accepted as received by the seller. Each order was a separate offer by the buy-

er and when accepted by the seller, constituted an independent contract. This is fundamental in the law of contracts. WILLISTON ON SALES, p. 806; *Elberig v. Elling*, 176 Mich. 602, 142 N. W. 1066. So what we have here is a series of independent contracts between the same parties. Each order was a separate contract and the failure of the buyer to pay for one or more did not justify a breach of another by the seller. *Wooten v. Walters*, 110 N. C. 251; *Dingley v. Oler*, 117 U. S. 490; *Arbuthnot v. Strecheisen*, 35 L. J. C. P. (n. s.) 305. So when the seller sued for the purchase price of the goods delivered, the buyer could bring a cross action for damages due because of delay in certain contracts and entire non-performance in other contracts. Under the statutory counter-claim (Gen. St. par. 7757) a defendant in Minnesota may counterclaim for any cause of action arising out of an independent contract, in existence at the time of the commencement of the suit.

Even if there had been some general understanding between the parties as to future business, there is authority that even then each order constituted a separate and independent contract. In *Bowers Granite Co. v. Farrell & Co.*, 66 Vt. 314, 29 Atl. 491, the parties having entered into negotiations as to future business, it was arranged that plaintiff should pay defendant for all orders within thirty days from the delivery of each. The court there held that each order constituted a separate and independent contract, and that a failure upon the part of the plaintiff to pay for one order within thirty days would be no justification to the defendant in refusing to execute other orders which it had then accepted. See also *Peoria Mfg. Co. v. Vain Mfg. Co.*, 76 Mo. App. 76.

The language of the opinion is such that it is impossible to determine with certainty whether there was here a series of independent contracts, a series of installment contracts, or whether some were entire and some divisible. The result is that a maze of hypothetical situations may be presumed, without knowing which one actually existed. The result reached by the court was, however, desirable and very probably correct.

SCHOOLS AND SCHOOL DISTRICTS—DUTY TO ISSUE DIPLOMA—REMEDY BY MANDAMUS PROCEEDINGS.—The plaintiff having attended the defendant high school for a term of four years, and having fully completed the required high school course, was refused her diploma because of her failure to wear a cap and gown at the graduating exercises. She brought action for a writ of mandamus to require the defendants to issue her a diploma and a copy of the grades made by her during her course. Held, that the writ should be granted. *Valentine v. Indept. School Dist. of Casey*, 174 N. W. 334. (Iowa Sup. Ct.)

The question of a right to a mandamus to compel the issuance of a diploma is one on which there is very little authority. What few cases there are follow the fundamental principles of mandamus as enunciated in *HIGH ON EXTRAORDINARY LEGAL REMEDIES*, §24, to the effect that mandamus will lie to compel the performance of

ministerial duties which involve no element of discretion. Following that broad rule the courts have held that where there is a fair occasion for the exercise of discretion on the part of the school board or faculty as to what persons were entitled to diplomas or degrees, mandamus would not lie to compel the issuance thereof. *State ex rel. O'Sullivan v. New York Law School*, 68 Hun 118, 22 N. Y. Supp. 663; *People ex rel. Jones v. New York Homeopathic Medical College*, 20 N. Y. Supp. 379. In *State of Wis. ex rel. Burg v. Milwaukee Medical College*, 128 Wis. 7, 106 N. W. 116, mandamus was refused to compel a private medical college to comply with its contract to furnish a diploma to a student who had completed its course, the court holding that there was an adequate remedy in an action for breach of contract or suit for specific performance. *State of Neb. ex rel. Nelson v. Lincoln Medical College*, 81 Neb. 533, 116 N. W. 294, *contra*, citing in support *Baltimore University v. Colton*, 98 Md. 623, 57 Atl. 14; *People ex rel. Cecil v. Bellevue Hospital Medical College*, 128 N. Y. 621, 28 N. E. 253. From these cases we might formulate the rule that there is a duty to issue diplomas or degrees to those who are entitled to them, but when there is a question as to whether or not the particular person is entitled to such diploma or degree, that is a discretionary matter for the school authorities to determine and not to be controlled by the courts by mandamus.

In the instant case there was no statute expressly requiring the issuance of a diploma to one who had earned it, and it does not appear what rules, if any, were provided by defendants with regard to those who may complete the course. The court took the position that even without a statute there is an implied legal duty to issue written evidence of graduation in some form to those who have satisfactorily completed the prescribed course of study, unless for sufficient reasons they are justified in withholding it. Defendants having adopted the method of issuing diplomas, could not now discriminate against the plaintiff.

The court considered that the action of the defendants in refusing to grant the plaintiff a diploma was arbitrary and the penalty for plaintiff's refusal to wear a cap and gown unreasonable and harsh. It was the opinion of the court that the public ceremonial is not a graduation and is not what entitles a student to a certificate or diploma, but it is the completion of the prescribed course which entitles one to a diploma. The school board might have prohibited her taking part in the graduation exercises without a cap and gown, but they could not refuse her a diploma. Such action was beyond their power. Plaintiff was entitled to diploma and it was not a discretionary matter for the board, but a legal obligation imposed on them as such school officers.

The court did not seem to be much impressed with the weight of the plaintiff's reason for not wearing the cap and gown, which was the alleged danger of catching contagious diseases from them and that the smell of disinfectant on them was unbearable, but decided

the case on the broader ground that the withholding of a diploma for not wearing the cap and gown was unreasonable and arbitrary.

The defendants contended that as Code §4344 provides that mandamus shall not be issued where there is a speedy and adequate remedy in the ordinary course of the law, that the plaintiff's remedy was by appeal to the county superintendent under §2818. But the courts have interpreted this latter section to apply only to discretionary acts. Whenever a party is dissatisfied with the decision of an inferior body or officer he may appeal to the county superintendent to review that decision to determine whether or not their discretion was properly exercised. In such a case the action of the county superintendent is conclusive upon the parties. But in cases where there is no opportunity for the exercise of discretion or where the jurisdiction or powers of the inferior body or person are brought in question, the remedy is by mandamus. *Perkins v. Board of Directors*, 56 Iowa 476, 9 N. W. 56; *Hinkle v. Saddler*, 97 Iowa 526, 66 N. W. 765; *Kinzer v. Indept. School Dist.*, 129 Iowa 441, 105 N. W. 686. This is in accordance with the general rule that in an action of mandamus or other special proceedings, the question whether an inferior tribunal such as a school board has acted within the scope of its authority may be determined. *State v. Board of Education*, 63 Wis. 234, 23 N. W. 102; *King v. Jefferson City School Board*, 71 Mo. 628, 36 Am. Rep. 499; *Board of Education v. Purse*, 101 Ga. 422, 28 S. E. 896. The court here having determined that there was no question of discretion left, the proper course was a writ of mandamus.

WILLS—CONTINGENT WILL—DEATH WHILE ON JOURNEY.—The heirs at law of a decedent objected to the probate of a written instrument as the deceased's will. The decedent was a resident of Des Moines and in contemplation of an extended visit to California he executed a properly attested instrument beginning with the phrase, "In case of any serious accident", and concluding with the disposition of his property. His death did not occur while he was on the contemplated trip. Held, that the writing was a valid will. *In re Tinsley's Will*, 174 N. W. 4. (Iowa Sup. Ct.)

That a will may be dependent upon a condition and consequently inoperative if the condition fails was first decided in *Parsons v. Lanoe*, 1 Ves. Sr. 189. The principle has been fully recognized in subsequent decisions. *Goods of Thorne*, 4 Sw. & Tr. 36; *Damon v. Damon*, 90 Mass. 192; *Tarver v. Tarver*, 34 U. S. 174, 9 L. Ed. 91. The point of difficulty is no longer in the statement and recognition of the rule, but in its application to the facts of individual cases. When do the words of a testamentary instrument express a condition precedent, the failure of which will invalidate the instrument as a last will? Because of the strong tendency of the courts to disfavor intestacy, the instrument whenever possible will be construed to be unconditional, rather than conditional. *Eaton v. Brown*, 193 U. S. 411, 48 L. Ed. 730; GARDNER ON WILLS, 2nd ed., §18. The cases most frequently arising are those in which the testator refers

to impending danger and the possibility of death under certain circumstances or within a stated period of time. In each case the court must determine whether the intention is to make the will dependent on a condition, or whether the testator is merely stating the circumstances which induce him to make a testamentary disposition. *Goods of Mayd*, 6 P. D. 17; *Redhead v. Redhead*, 83 Miss. 141, 35 So. 761; *Farquer's Estate*, 216 Pa. 331, 66 Atl. 92. In order to make the will contingent there must be a clear and unambiguous statement of an express condition. *Cody v. Conley*, 27 Gratt. 313; *Likefield v. Likefield*, 82 Ky. 589; *Maxwell v. Maxwell*, 60 Ky. 101; *Magee v. McNeil*, 41 Miss. 17. The expressions of the will must be so clear as to admit of no other interpretation. *Skipwith v. Cabell*, 19 Gratt. 758; *Goods of Dobson*, L. R. 1 P. & D. 88; *In re Jeffries' Estate*, 18 Pa. Sup. Ct. 439. If the language is ambiguous, or if there is any possible doubt as to the contingent character of the instrument it will be held to be unconditional. *Ex parte Lindsay*, 2 Bradf. Surr. 204. Although isolated phrases may express a condition, the intention to be gathered from the instrument as a whole will govern. *Eaton v. Brown*, *supra*. If possible an express condition will be limited in its operation to a certain devise or bequest instead of being applied to the whole instrument. *Damon v. Damon*, *supra*; *Ex parte Lindsay*, *supra*.

While the above stated principles of construction are universally recognized, there is an entire lack of harmony in their application. The language of the will in a Kentucky case was, "Should anything happen that I should not return alive", and in a Pennsylvania case, "If I should not get back." These were held to be contingent. *Dougherty v. Dougherty*, 61 Ky. 25; *Marrow's Appeal*, 116 Pa. 440, 9 Atl. 660. Compare these cases with a Massachusetts case in which the language was, "If by casualty or otherwise, I should lose my life during this voyage", and a West Virginia case, "Let all men know hereby, if I get drowned this morning." These were held to be unconditional. *Damon v. Damon*, 90 Mass. 192; *French v. French*, 14 W. Va. 458. The present case fails entirely to state a condition. The words "serious accident" are interpreted by the court to mean death. But it is not an instrument to become effective on death during a certain period of time for no limitation of time is expressed, and none can be introduced from extrinsic evidence. *Sewell v. Slingsluff*, 57 Md. 537. The language of the instrument only states that it is to become effective upon the death of the testator, and such event is the necessary prerequisite for the operation of every testamentary disposition.

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THE UNIFORM CONDITIONAL SALES ACT IN IOWA¹

The term "conditional sale" may properly be used to describe various situations in which the transfer of title to personal property is dependent upon some condition. Practically, however, it has come to have a technical use in business, and refers to a bargain in which title is retained by the seller as security for the purchase price.²

"The typical case of conditional sale is a sale in which the transfer of title is conditional upon the payment of the price. Though sales upon other conditions may readily be imagined, the practice of selling goods with a retention of the title until payment of the price is so common that the ordinary meaning of the term 'conditional sale' is confined to sales upon this particular condition. . . . These cases present . . . a typical case of a sale to take effect in the future by force of its own terms without further expression of assent by the seller, or indeed in spite of his dissent."³

The Uniform Conditional Sales Act presents in detail provisions for the regulation of such transactions and the protection of the parties and the public in reference to them. This situation has as yet received but little attention in Iowa in the form of legislation. Though the amount of business concerned with this kind of contract is very large and constantly increasing, practically all details have been left to express contract between the parties, and to such rules as the court might develop as individual cases have come up

¹ The Uniform Conditional Sales Act has been approved by the Code Commission and recommended by them for adoption as a part of their report to the next session of the Legislature. This article has been prepared at the request of the Commission in order to show the effect of its adoption upon the Iowa statutes and decisions.

² "It will be evident to any one who has occasion to examine the cases that the term 'conditional sale' has been indiscriminately applied to a great variety of differing transactions, and that much confusion has resulted therefrom. It will be further evident that this confusion is the legitimate result and natural consequence of the ill-advised efforts of the framers of these agreements to make them appear to be what they are not." *MECHEM ON SALES*, §559.

³ *WILLISTON ON SALES*, §7.

for decision. The result which unfortunately flows from this situation is that the seller, by the terms of the agreement, seeks to protect himself at the expense of the buyer, until the installment contract, which is so usually put in the form of a conditional sale, has been in some disfavor with the courts, which seek to even up the positions of the parties by limiting the seller in the exercise of his remedies in the enforcement of his bargain, which in turn makes the seller more cautious, and the terms of the bargain more harsh.

As the idea of conditional sales is purely that of security for the purchase price, there is no more justification for leaving all matters of this kind to contract between the parties, than in the case of a mortgage. The seller nearly always has the advantage of position and in many cases through provision for forfeitures and similar terms is able to throw great hardship upon an improvident or unfortunate buyer.⁴

Until the Thirty-eighth General Assembly⁵ there were but few detailed provisions even for the recording of chattel mortgages. These provisions now apply to conditional sales since the Iowa statute on conditional sales says that such transactions are to be recorded like chattel mortgages.⁶ However, the two relations are distinct and separate and have in common only the fundamental idea of security. Though the security idea should be worked out along similar lines, the situations are so different that they deserve separate treatment.⁷ Prior to the Thirty-eighth General Assembly there was only one section in the Code dealing directly with condi-

⁴ "At common law, the conditional sale possessed for the seller decided advantages over the chattel mortgage. It provided him with a speedy and effective method of 'self help'. It gave to the buyer no equity of redemption. It was often used by the seller as a means of oppressing the needy and as a vehicle of extortion. While the Uniform Conditional Sales Act undertakes to prevent the seller from using his contract as an instrument of oppression or extortion, it secures to him every legitimate and fair advantage which that form of contract possesses over the chattel mortgage." Professor Francis M. Burdick in 18 *Columbia Law Rev.* 103 at 108.

⁵ 38 G. A., Ch. 352, repealing Code §2906.

⁶ 37 G. A., Ch. 154, repealing Code §2905.

⁷ "Although it has been urged that a conditional sale is, essentially, a chattel mortgage, it does not follow that the name mortgage includes within its meaning a conditional sale. Though the two transactions are in essence the same, they are different in form, and by virtue of this difference have been given different names. Accordingly, . . . statutory provisions in regard to chattel mortgages would not be held to include within their scope conditional sales." WILLISTON ON SALES, §337.

tional sales generally,⁸ and hence, as but few cases can have as yet arisen under the new provisions or the new recording law established for chattel mortgages, this seems an especially opportune time to pass a complete and uniform act fully covering the subject of conditional sales, since business done under conditional sales agreements must be adjusted to new rules, either those provided for chattel mortgages or the new provisions set forth in the Uniform Conditional Sales Act, if it should be adopted. It therefore seems desirable at this time to adopt such rules and regulations as are particularly adapted to and especially drawn for the situations in conditional sales, rather than to be forced to fit all conditional sale situations to provisions which have been framed without any special reference to their peculiarities.

As to the recent statute for the recording of chattel mortgages,⁹ this would in no way be affected by the adoption of the Conditional Sales Act, but would be left just as it is, since this statute itself applies only to chattel mortgages and sales where the vendor retains possession, and is only made applicable to conditional sales by the provision in the conditional sales statute¹⁰ that such sales are to be recorded like chattel mortgages.

In drawing up the provisions of the Act careful comparison of the statutes and decisions of all jurisdictions has been made, and upon most points therefore the Act gives expression to that which has already been tried out in various states and that which represents the weight of authority in the various jurisdictions.

The Uniform Conditional Sales Act has been in preparation since 1915 when the National Conference of Commissioners on Uniform State Laws first undertook its preparation and secured Professor George G. Bogert of Cornell University to draft such an Act. Three tentative drafts were submitted and discussed at the annual meetings of the Conference in 1916, 1917, and 1918. In 1918 the Act, in its present form, was approved and recommended by the Conference and upon the report of the Committee on Uniform State Laws of the American Bar Association it was, at the meeting of the Association in September, 1919, approved and recommended for adoption by the legislatures of the various states.

Though but so recently approved, it has already been enacted in

⁸ 37 G. A., Ch. 154, repealing Code §2905. See also Code Suppl., §§2051, 2052, quoted notes 31 and 32 *infra*.

⁹ 38 G. A., Ch. 352.

¹⁰ 37 G. A., Ch. 154.

the following jurisdictions: Arizona, Delaware, New Jersey, South Dakota, Wisconsin, and Alaska.

The recently enacted Uniform Sales Act¹¹ does not purport to cover the situations involved in conditional sales.

In commenting on and comparing the present legislation in Iowa and the provisions of the proposed Uniform Sales Act, the legislative provisions in Iowa are called the "statutes", while the proposed uniform law is spoken of as the "Act".

SECTION 1. [Definition of Terms.] In this Act "Conditional sale" means (1) any contract for the sale of goods under which possession is delivered to the buyer and the property in the goods is to vest in the buyer at a subsequent time upon the payment of part or all of the price, or upon the performance of any other condition or the happening of any contingency; or (2) any contract for the bailment or leasing of goods by which the bailee or lessee contracts to pay as compensation a sum substantially equivalent to the value of the goods, and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming the owner of such goods upon full compliance with the terms of the contract.

"Buyer" means the person who buys or hires the goods covered by the conditional sale, or any legal successor in interest of such person.

"Filing district" means the sub-division of the state in which conditional sale contracts, or copies thereof, are required by this act to be filed.

"Goods" means all chattels personal other than things in action and money, and includes emblements, industrial growing crops, and things attached to or forming a part of land which are agreed to be severed before sale or under the conditional sale.

"Performance of the condition" means the occurrence of the event upon which the property in the goods is to vest in the buyer, whether such event is the performance of an act by the buyer or the happening of a contingency.

"Person" includes an individual, partnership, corporation, and any other association.

"Purchase" includes mortgage and pledge.

"Purchaser" includes mortgagee and pledgee.

"Seller" means the person who sells or leases the goods covered by the conditional sale, or any legal successor in interest of such person.

The definition of conditional sales as given in the Iowa statute does not differ materially from that stated in the Conditional Sales Act. The Iowa statute¹² says "no sale" or "contract", while the

¹¹ 38 G. A., Ch. 396.

¹² 37 G. A., Ch. 154, as amended by 38 G. A., Ch. 352, §12. "No sale, contract or

Conditional Sales Act, though using the phrase "contract for the sale of goods", does not mean to limit its scope only to those cases where no present interest in the goods has passed as between the parties.¹³ The Iowa statute speaks of "any condition". This wording is adopted in the Conditional Sales Act, which has not added anything by the mention of the condition which is most usual, *i. e.*, the payment of the price. Nor does it seem desirable to limit the operation of the statute to this one condition only as has been done in some states, for the effect and the reason is the same no matter what the condition may be.

The Iowa cases have made clear that the condition need not be the payment of the purchase price, but may be "any condition", as for example, the final payment of notes given for the price, *National Cash Register Co. v. Zangs*, 127 Iowa 710, or the execution of a chattel mortgage on the goods purchased, *Thorpe Bros. & Co. v. Fowler*, 57 Iowa 541. But the sale must be subject to *some* condition, and unless the transfer of title or property rights is thus dependent and some provision is made for the buyer to become the owner of the property, the case cannot come within the scope of the subject of conditional sales and cannot be subject to the rules provided for such transactions. The retention of all rights by the seller without making their transfer dependent upon some later condition cannot be a conditional sale. *Gilman Linseed Oil Co. v. Norton*, 89 Iowa 434.

The definition of conditional sale as stated in the Act corresponds in all essential particulars to that stated in numerous Iowa cases. The definition as given in Section 1, together with the Primary Rights of the Buyer, and of the Seller, as set forth in

lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any creditor or purchaser of the vendee or lessee in actual possession obtained in pursuance thereof, without notice, unless the same be in writing, executed by the vendor and vendee, or by the lessor and lessee, acknowledged by the vendor or vendee, or by the lessor or lessee, and recorded or filed and deposited the same as chattel mortgages."

¹³ "The ordinary conditional sale does not rest wholly in agreement. It is not merely a contract to sell to which is superadded a contract that the buyer shall have possession. If this were all, the seller could at any time break his contract, subjecting himself thereby to liability of damages. In fact the buyer acquires not simply a contract right but a property right," and "though payment be a condition precedent to the vesting of legal title, it is not a condition precedent to the vesting of a right of property in the buyer, called in the cases a 'special property'." WILLISTON ON SALES, §330.

Sections 2 and 3, together with the later provisions for redemption, Section 18, compulsory resale, Section 19, and other sections containing provisions of a like nature, show clearly that the theory of the Act is that "a conditional sale is practically equivalent to a chattel mortgage, and that the rights of buyer and seller in the conditional sale ought to coincide with those of chattel mortgagor and mortgagee as nearly as possible."¹⁴ This idea of the essential qualities of a conditional sale is clearly stated in *Donnelly v. Mitchell*, 119 Iowa 432: "To constitute a conditional sale within the terms of the statute, there must be a delivery of possession to the purchaser, with the intention of passing immediate ownership, subject only to the reservation of title to the seller as security for the purchase money." In *Gaar, Scott & Co. v. Nichols*, 115 Iowa 223, such a sale is thus described: "A conditional sale involves the delivery to the vendee as owner, with reservation to the vendor of title only for the purpose of security." Expressing the same fundamental idea of the transaction, see *Davis etc. Co. v. McHugh*, 115 Iowa 415; and *Elijah & Winne v. Mottinger*, 161 Iowa 371.

The definition as given in this section, if taken alone, and not read with the later sections above mentioned would be entirely too broad, that is, where "possession is delivered to the buyer and the property in the goods is to vest in the buyer at a subsequent time" upon the performance of any condition. This definition unless taken in connection with the following sections above mentioned, would include such a case as *Budlong v. Cottrell*, 64 Iowa 234, where goods were sent upon order, with the agreement that "the title, ownership and right of possession shall be and remain in J. J. Budlong & Co. [the seller] until settled for as provided in the contract." The court in this case said, "No credit whatever was given, nor was any right or interest in the property to pass until settlement." Under such interpretation of the facts the court very properly held that this was not a sale, either absolute or conditional. This holding conforms to the idea of conditional sales as shown in the next two sections, particularly Section 3, which shows that the buyer is absolutely liable for the price. As is said by the draftsman in his notes to Section 2,

"The special right of a buyer under a conditional sale where he is not in default is to retain possession even though the price is not yet paid, and to acquire title, and not merely a right of action for breach of contract, by satisfying the condition."

¹⁴ Draftsman's notes to Section 18 of the Act.

The Iowa statute, as does the Act, also includes the so-called "leases"¹⁵ which are often made use of in attempting to avoid various provisions of conditional sale statutes. Though stated in more detail, the Act does not add to or vary the terms of the present statute in this respect. *Singer Sewing Machine Co. v. Holcomb*, 40 Iowa 33; *Handlan-Buck Mfg. Co. v. Waterloo Drop Forge Co.*, 173 Iowa 452. The Act in mentioning "any contract for the bailment . . . of goods by which the bailee . . . is bound to become . . . the owner", does not enlarge the scope of the present statute, though the word bailment is not there mentioned. It may, however, forestall attempts to distinguish on technical terms what are in fact and according to the intent of the parties, conditional sales. Most courts, without special statutory mention of "leases" or "bailments", have found no difficulty in seeing and treating the transaction as the parties really intended it, going on the sound principle that "a rose by any other name would smell as sweet", and that a transaction is a conditional sale and should be treated as such if it contains the fundamentals of conditional sales, regardless of what the parties may have named it. *Handlan-Buck Mfg. Co. v. Waterloo Drop Forge Co.*, 173 Iowa 452.

The statement that the conditional sale covers the situation where the "bailee or lessee . . . has the option of becoming the owner of such goods upon full compliance with the terms of the contract", should not be confused with the cases in which there is a mere bailment with the option of becoming the owner upon the performance of some condition. The fundamental difference is in the fact that in the first situation the buyer is under obligation to pay the full purchase price, while in the second case he is not. As the draftsman has stated in his notes to this section:

"That the buyer, in some cases, has the option of becoming the owner and thus a sale is not sure to take place, is of but small importance, for, as a practical matter, the buyer will always be willing to accept ownership when he has paid the value. The instances of a buyer declining to become the owner of goods where he has paid 'rent' equivalent to the value of the goods, and electing to return the goods and allow these payments to be considered as actual rent, must be exceedingly infrequent."

That a bailment with an option to purchase, but without an obligation to pay the purchase price, is not a conditional sale is very clearly shown in *Donnelly v. Mitchell*, 119 Iowa 432, where it is said:

¹⁵ See note 12.

"If the contract is conditional as to the transfer of ownership to the vendee, so that on his failure to perform the condition no right as owner has passed to him, and no definite obligation to pay the purchase price has accrued, then, instead of the transaction being a conditional sale, such as is contemplated by the statute, the delivery of possession constitutes a bailment only, with a right of purchase."

However, in *Wright v. Barnard Bros.*, 89 Iowa 166, the court seems to be confused on this point and holds a transaction to be a conditional sale, where the buyer had the option to pay, but was not under obligation to do so. This, of course, is entirely different from having the option to refuse to take the goods after having made full payment as is stated in this section of the Act, and is not properly treated as a conditional sale. The situation as presented by the court does not show a conditional sale. In stating the facts, the court says:

"The transfer was made with knowledge of the fact that the defendants desired to exchange the horse for other property. It is true, when the horse was delivered to them, they had not said they would purchase him, and the delivery cast upon them no obligation to do so. But they were given the right of possession under an agreement which gave them the option to return the horse or pay the agreed price and keep him. Nothing further was required on the part of the plaintiff. The sole purpose of the condition as to the title was to secure the payment of the purchase price."

However, the result which the court reached, that the innocent purchaser for value without notice should be protected, may be sustained if the facts can be interpreted as showing an agreement "on sale or return". Such a transaction is entirely different from a conditional sale, for in sale or return there is a present passing of title to the buyer with an obligation on his part to pay the purchase price, but with the privilege of later freeing himself from all obligation by a return of the goods.¹⁶ This is a "condition subsequent", but such a condition is not the kind involved in conditional sale, and any person buying from the original purchaser, before the exercise of the right to return, would receive a good title, and his rights would in no way depend upon the provisions for the recording of conditional sales. This difference is clearly pointed

¹⁶ The Uniform Sales Act, 38 G. A., Ch. 396, §19, Rule 3 (1) provides for "sale or return" as follows: "When goods are delivered to the buyer 'on sale or return', or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revert the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time."

out in *Mowbray v. Cady*, 40 Iowa 604, which states, "the contract referred to is one creating the relations of vendee or lessee", for, as the court points out, if this was not the situation, then the property was in the buyer's "possession upon trial, with a view to making a purchase of it, if it should prove satisfactory." Not every condition upon which the passing of title is dependent, creates a conditional sale, though there is often considerable confusion in the discussion of such cases. See *Briggs v. McEwen*, 77 Iowa 303, where parties intended a "cash sale", that is, that buyer should acquire no rights whatever until purchase price was paid, and not a "conditional sale" where buyer would become obligated for the price although not to receive the title, retained by the seller for security, until a later time. To the same effect, see *Budlong v. Cottrell*, *supra*.

Even if the case of *Wright v. Barnard Bros.*, *supra*, cannot be worked out on an interpretation of the facts as showing an agreement "on sale or return", nevertheless, the protection of the innocent buyer may be sustained, because the transaction as between the original parties was fraudulent as to such third party. *Robinson v. Chapline*, 9 Iowa 91; *Crooker Bros. & Lamereaux v. Brown*, 40 Iowa 144. The seller delivered the property to the buyer so that he might represent it as his own in inducing a sale of his stock farm. This was done and the purchaser innocently relied upon the representations which the original owner of the goods helped to make, and hence, he should be estopped from setting up the fact that title had not actually passed as between himself and the party who originally dealt with him for the known purpose of securing the property to induce the innocent purchaser to rely upon the appearance of ownership. Though the treatment of this case as a conditional sale is undoubtedly wrong, it does not appear to have been distinguished, criticised or over-ruled in any later cases.

This situation is now covered by express provision in the Uniform Sales Act¹⁷ which expresses the general rule that "where goods are sold by a person who is not the owner thereof . . . the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

SECTION 2. [Primary Rights of Buyer.] The buyer shall have the right when not in default to retain possession of the goods, and he shall also have the right to acquire the property in the goods on

¹⁷ 38 G. A. Ch. 396, §23.

the performance of the conditions of the contract. The seller shall be liable to the buyer for the breach of all promises and warranties, express or implied, made in the conditional sale contract, whether or not the property in the goods has passed to the buyer.

The Iowa statute differs from this section somewhat in wording but not in effect. While the statute in terms only refers to a purchaser of goods "in actual possession obtained in pursuance" of the bargain, this section states more fully what is clearly understood in the protection of the buyer's rights under the statute, i. e., that he has "the right when not in default to retain possession of the goods, and . . . to acquire the property in the goods on the performance of the conditions of the contract." See *Elijah & Winne v. Mottinger*, 161 Iowa 371. The term "property in the goods" as used in the Act means full property rights to be evidenced by legal title such as to entitle the buyer to full protection in his ownership of the goods as against all the world. Even though the expression, "the right to acquire the property in the goods", might, alone and by itself, suggest the inference that the buyer had nothing but a mere right, the expressions in numerous other sections make clear that this wording is equivalent to the expression used in *Elijah & Winne v. Mottinger*, *supra*, "that the ownership of the property rested in him [the buyer] subject only to the right and remedy conferred by the contract upon the plaintiff [the seller] by way of security for the collection of the price." The provision as to warranties not only makes clear that the transaction is to be treated as a sale and that the buyer acquires rights as in the case of an out-and-out sale, but it also frees from any doubt the question of the buyer's remedies and grants him such relief as would be given to the buyer in the law of sales. The buyer's remedies for breach of warranty are given in the Uniform Sales Act.¹⁸

SECTION 3. [Primary Rights of Seller.] The buyer shall be liable to the seller for the purchase price, or for installments thereof, as the same shall become due, and for breach of all promises made by him in the conditional sale contract, whether or not the property in the goods has passed to the buyer.

This section together with the preceding one shows clearly the fundamental nature of a conditional sale, that is, as stated in numerous Iowa cases, cited in Section 1, that the ownership of the goods passes to the buyer, who has the obligation to pay the purchase price, as security for which the seller retains the legal title.

¹⁸ 38 G. A. Ch. 396, §69.

Without such obligation to pay the situation is not properly to be considered as that of conditional sale. *Conable v. Lynch*, 45 Iowa 84; *Donnelly v. Mitchell*, 119 Iowa 432. But see *Wright v. Barnard Bros.*, 89 Iowa 166, criticised *supra*, p. 136.

SECTION 4. [Conditional Sales Valid Except as Otherwise Provided.] Every provision in a conditional sale reserving property in the seller after possession of the goods is delivered to the buyer, shall be valid as to all persons, except as hereinafter otherwise provided.

The same rule is stated in the Iowa statute, but in a negative form, that is that "no [conditional] sale shall be valid", against certain named classes of persons, thus leaving it valid as to all others. That such sales in the absence of statute are valid, even as against innocent third persons who have paid value,¹⁹ has been held by the Iowa court, *Bailey v. Harris*, 8 Iowa 331; *Baker v. Hall*, 15 Iowa 277; *Moseley & Bro. v. Shattuck*, 43 Iowa 540; so also as to attaching creditors without notice, *Knowlton v. Redenbaugh*, 40 Iowa 114. As between the parties themselves or those who take with notice or do not come within one of the excepted classes the agreement is valid even under the statute. *Warner v. Jameson*, 52 Iowa 70; *Wilcox v. Williamson Law Book Co.*, 92 Iowa 215; *Zacharia v. Cohen Co.*, 140 Iowa 682; *Gluck Co. v. Therme*, 154 Iowa 201; *Snyder v. Collins*, 164 N. W. (Iowa) 624; *American Laundry Mach. Co. v. Everybody's Laundry*, 171 N. W. (Iowa) 161.

This section makes applicable the provisions of the act "after possession of the goods is delivered to the buyer". The Iowa statute uses the phrase "in actual possession obtained in pursuance" of the bargain. This latter wording has given rise to much litigation, to determine its exact meaning. *Warner v. Johnson & Hake-man*, 65 Iowa 126; *Vorse v. Loomis*, 86 Iowa 522; *Rock Island Plow Co. v. Maynard Savings Bank*, 123 Iowa 640. See also, the same phrase defined with reference to the recording of chattel mortgages. *King v. Wallace Bros.*, 78 Iowa 221.

"After possession of the goods is delivered to the buyer" though not differing materially from the wording of the Iowa statute is a clear and direct statement which should give rise to few difficulties of interpretation.

¹⁹ The Uniform Sales Act provides, 38 G. A. Ch. 396, §23 (1): "Where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

SECTION 5. [Conditional Sales Void as to Certain Persons.] Every provision in a conditional sale reserving property in the seller, shall be void as to any purchaser from or creditor of the buyer, who, without notice of such provision, purchases the goods or acquires by attachment or levy a lien upon them, before the contract or a copy thereof shall be filed as hereinafter provided, unless such copy or contract is so filed within ten days after the making of the conditional sale.

For the somewhat ambiguous phrasing of the Iowa statute as to creditors who are to be protected, there is substituted the plainly worded statement in the Act, though numerous decisions in this State have made clear that the words "without notice" in this and the similarly worded chattel mortgage statute refer to "creditors" as well as to "purchasers". *Allen v. McCalla*, 25 Iowa 464; *Handlan-Buck Mfg. Co. v. Waterloo Drop Forge Co.*, 173 Iowa 452. The effect of the decisions as to who is a creditor without notice under the statute is to include within its terms such an one as is described in the Act as a creditor who "acquires by attachment or levy a lien" upon the goods. *American Laundry Mach. Co. v. Everybody's Laundry*, 171 N. W. (Iowa) 161.

However, the interpretation given to the phrase "creditors without notice" in the present statute, would seem to be somewhat broader than the wording used in the Act, for in numerous cases passing upon the question in the chattel mortgage statute,²⁰ with reference to the phrase "*existing* creditors without notice", our court has said that to entitle such a creditor to protection "it must appear that he acquired a lien by attachment or execution levy *or otherwise* without notice." *Orr v. Kenworthy*, 143 Iowa 6. Though the conditional sales statute, 37 G. A. ch. 154, says only "creditors", and not "existing creditors", as is stated in the chattel mortgage statute, the question of whether or not the creditor, whether "existing" or not, is without notice is the same in both cases. As to who is such creditor or purchaser without notice, see *Singer Sewing Machine Co. v. Holcomb*, 40 Iowa 33; *Moline Plow Co. v. Braden*, 71 Iowa 141; *Thatcher v. Union Scale Co.*, 74 Iowa 117; *National Cash Register Co. v. Maloney*, 95 Iowa 573; *National Cash Register Co. v. Broeksmit*, 103 Iowa 271; *Union Bank of Wilton v. The Creamery Package Mfg. Co.*, 105 Iowa 136; *National Cash Register Co. v. Zangs*, 127 Iowa 710.

A general assignment for the benefit of creditors does not make the assignee a creditor or purchaser for value without notice. *In*

²⁰ Code §2906, now 38 G. A. Ch. 352, §2.

re Wise, 121 Iowa 359; *Jenks v. Smith*, 129 Iowa 139; *Gluck Co. v. Therme*, 154 Iowa 201; *Handlan-Buck Mfg. Co. v. Waterloo Drop Forge Co.*, 173 Iowa 452.

Property taken over by a trustee in bankruptcy seems, however, to be on a somewhat different basis.

"By the express terms of the Bankruptcy Act, the trustee takes all the property 'which might have been levied upon and sold under judicial process against' the bankrupt. This would seem to give the trustee a right to the property in a case where a creditor could successfully have levied upon it. The Supreme Court of the United States has held, and obviously correctly, that in each case the question must depend upon the rights which the State law gives to creditors."²¹

Neither the present statute nor the Act limits its protection to *existing* creditors as does the chattel mortgage statute.

The Iowa statute has been construed not to protect a landlord, under his landlord's lien, as against the seller in a conditional sale when the relation of landlord and tenant was entered into before the tenant secured the property under the conditional sale, since the landlord, as creditor, could not have relied upon it as security for payment. On the question of priority as between conditional sale and a landlord's lien, the Court said, *Snyder v. Collins*, 164 N. W. (Iowa) 624:

"If the tenant, when the lease is executed, is already in exercise of apparent ownership of the property, and the conditional sale is not in writing and recorded, the landlord in such case is a subsequent creditor who, if without notice, may treat the condition as void."

See also, *Thorpe Bros. & Co. v. Fowler*, 57 Iowa 541. It is the intent of the Act to include prior as well as subsequent creditors who come within its terms, and it therefore changes the Iowa rule as expressed in the case of *Snyder v. Collins*, *supra*.

There would seem to be just as much reason for protecting one who secured *any* lien on the goods, even though not by attachment or levy, and it would seem desirable if the words "or otherwise" were inserted after the word "levy". Though this departs from strict uniformity, it will lessen the possibility of litigation to determine whether liens which would ordinarily be clearly entitled to protection, were cut off from such protection by the wording of the Act. The draftsman himself in the comments on this section gives reasons which apply with as much force to one who may have

²¹ WILLISTON ON SALES, §326. See also *American Laundry Machinery Co. v. Everybody's Laundry*, 171 N. W. (Iowa) 161.

acquired a lien in any manner, as to one who has acquired his lien by attachment or levy. He sets off against this group the "general, unsecured creditors." He comments as follows on this point:

"The statute as drafted protects both prior and subsequent creditors who have acquired a lien on the goods by levy or attachment. By such act they have in a certain sense become purchasers of the goods. They have required [acquired] legal property rights in the goods, and, if they have done so innocently, they ought to be protected as against the conditional seller. Their equities are superior to his. General, unsecured creditors, on the other hand, unless they have advanced money or other property on the strength of the buyer's apparent ownership of these particular goods, have no equity as against the conditional seller. They have acquired no lien upon or property in the goods, and have not taken any step in reliance on the possession and apparent ownership of the buyer.

"It is submitted that justice to all deserving creditors will be worked out if only secured or lien creditors and subsequent creditors who have relied on the buyer's apparent ownership are protected."

In passing upon the question of "creditors without notice" in a chattel mortgage case, Ladd, J., says in *Blackman v. Baxter, Reed & Co.*, 125 Iowa 118:

"The lien created by the levy of a writ of attachment or execution, as distinguished from some other right to or interest in the property mortgaged, has never been held by this court to be essential before assailing an instrument as invalid because unrecorded. A right to the property obtained in any other way is quite as effective."

Even if such cases should be classed as creditors who have secured some lien upon or right to the goods other than by attachment or levy, they will very probably be included by judicial extension of the word "purchaser" to cover them. Thus in *Handlan-Buck Mfg. Co. v. Waterloo Drop Forge Co.*, 173 Iowa 452, a trustee who took over property for the benefit of creditors was called a "purchaser" under the statute and as such entitled to protection and he would still be called such purchaser under the wording of the Act. But even though one may have changed his position in reliance upon the "possession and apparent ownership of the buyer," suggested as sufficient in *Snyder v. Collins*, 164 N. W. (Iowa) 624, it is clear that he should not be entitled to protection unless as a creditor or purchaser he secures some right or claim upon the goods before notice. *Moline Plow Co. v. Braden*, 71 Iowa 141; *Wilcox v. Williamson Law Book Company*, 92 Iowa 215; *National Cash Register Co. v. Broeksmit*, 103 Iowa 271; *Zacharia v. Cohen Co.*, 140 Iowa 682.

In stating that "every provision . . . shall be void" as

to certain classes of persons, this section does not change the present Iowa statute, but merely states positively what the Iowa statute has phrased negatively in saying that "no sale . . . shall be valid" as against such persons. The Court has stated the effect of the statute affirmatively in *Pash v. Weston*, 52 Iowa 675: "The sale, we think, is to be regarded invalid in no sense except as a conditional sale, but is to be regarded invalid *as such* in the absence of notice actual or constructive."

The term "purchaser of the vendee" has been held to include a purchaser without notice from a purchaser of the vendee with notice, *National Cash Register Co. v. Maloney*, 95 Iowa 573; and such interpretation would cover the similar expression, "purchaser from the buyer," as used in the Act.

In allowing ten days for filing, and giving protection to the original parties during this time, the Act changes the Iowa statute. This is a desirable change, for, if the idea of conditional sale is in itself worth providing for, the parties ought to have a reasonable time to do the formal acts required in order to protect their rights. In allowing ten days for filing, the Act reduces this reasonable time to a certainty. The following reason for allowing the ten day period is given in the draftsman's notes:

"Under the statute the contract is valid for ten days without filing. It was thought unwise to require the seller to file immediately. The seller's office may be far distant from the filing district. He should have a reasonable time to mail his papers and get them filed."

The present statute requires the contract itself to be recorded, and hence is changed by the Act which provides for the filing of the "contract or copy". The draftsman's notes to this section state the argument, if any is necessary, for this change. He says:

"To require that the original contract or copy be filed seems best. Doubtless generally a copy will be filed. It seems useless to restrict the seller to either the original or a copy. The object is to make public the terms of the sale."

Though the Act does not state specifically that the contract should be in writing, this is clearly to be inferred since "it would be unusual, if not impossible, to record" a mere oral contract.²² The present Iowa statute provides expressly that the "contract, sale or lease . . . be in writing". The provision that "the contract or a copy thereof shall be filed" very clearly implies that the contract itself be in writing. Though 37 G. A. ch. 154 provides

²² *McAusland v. Rieser*, 82 N. J. Eq. 614.

that the "sale, contract, or lease" in order to be valid against certain persons must be in writing, "and recorded the same as chattel mortgages", the chattel mortgage act²³ provides for the recording of "such instrument or true copy thereof" and that it be "recorded or filed and deposited".

In amending 37 G. A. ch. 154, as is done in 38 G. A. 352, sec. 12, it is also made to read, as does the chattel mortgage statute, "recorded or filed and deposited", but no mention is made of the recording of a "true copy". It is at least doubtful under the present situation whether the contract only, or whether a "true copy thereof" may be recorded.

SECTION 6. [Place of Filing.] The conditional sale contract or copy shall be filed in the office [of the recorder in the county,] in which the goods are first kept for use by the buyer after the sale. It shall not be necessary to the validity of such conditional sale contract, or in order to entitle it to be filed, that it be acknowledged or attested. This section shall not apply to the contracts described in Section 8.

In providing in detail for the filing of the conditional sale the Act changes the present provision of the Iowa statute which only provides that it be "recorded or filed and deposited the same as chattel mortgages."

The section requiring chattel mortgages to be recorded was entirely rewritten, the former provisions as contained in Code §2906 repealed, and a new statute, 38 G. A. ch. 352, enacted, providing in detail for such recording. This statute though it made only a slight change directly with reference to conditional sales²⁴ by permitting them to be not only recorded, but also "filed and deposited" like chattel mortgages, however, brought about indirectly very extensive changes in that the conditional sales statute requires that such contracts be recorded like chattel mortgages, and hence the new chattel mortgage statute setting out in considerable detail new pro-

²³ 38 G. A., Ch. 352, §2: "No sale or mortgage of personal property, where the vendor or mortgagor retains actual possession thereof, is valid against existing creditors or subsequent purchasers, without notice, unless a written instrument conveying the same is executed, acknowledged like conveyances of real estate, and such instrument, or a true copy thereof, is duly recorded or filed and deposited with the recorder of the county where the property shall then be situated, or if the mortgagor be a resident of this state, then of the county where the holder of the property resides. . . ."

²⁴ 38 G. A. Ch. 352, §12, amended 37 G. A. Ch. 154 "by inserting . . . after the word 'recorded' the words 'or filed and deposited'."

visions for the recording of such mortgages, has effected similar changes with reference to all conditional sales.

The statute as recently amended²⁵ requires the contract to be "executed by the vendor and vendee", while as it was worded formerly it needed only to be executed by the vendor.²⁶ The Act merely says that the "contract or copy shall be filed." The essential and important thing is that a record should be made, and when made that it be effective so as to act as constructive notice to creditors or subsequent purchasers.²⁷ So long as the contract is a good contract as between the parties, there seems but little object in provisions as to the execution of the contract, for the purpose of the statute is not to protect one contracting party from the other, for the contract is good as between them, even though not recorded, but to protect third persons who may rely upon the apparent ownership of the buyer. The provision of the Act therefore seems sufficient.

The exact office in which the filing is to be done is not specified in the Act in order that each state may follow the plan with which it is most familiar, and which may best suit its situation. Following the present rule as to conditional sales, the blanks should be filled in so as to read "in the office [of the recorder in the county] in which", etc.

While the Act provides that the record shall be made in the county "in which" the goods are first kept for use by the buyer, under the statute concerning chattel mortgages, the record is to be made in the "county where the property shall then be situated or if the mortgagor be a resident of this state, then of the county where the holder of the property resides." The phrase "then be situated" is somewhat ambiguous, as it may refer to the situation of the property at the time when the transaction took place, or, when the transaction is recorded. The main difference between the Act and the present statute is that while the statute emphasizes the place of the seller's residence and requires recording there, the Act emphasizes the location of the goods and seeks to give protection at the place where it is most needed, *i. e.*, where creditors or innocent purchasers without notice may be deceived by the apparent ownership of the buyer.

The present statute providing for recording of conditional sales under the chattel mortgage statute was not drawn with any refer-

²⁵ 37 G. A. Ch. 154.

²⁶ Code §2905. See also *National Cash Register Co. v. Schwab*, 111 Iowa 605.

²⁷ *National Cash Register Co. v. Zangs*, 127 Iowa 710.

ence to the situation as it exists in conditional sales, where the seller retains title while the buyer takes possession, but was framed to care for chattel mortgages and sales where exactly the opposite situation exists, that is, where the "vendor" though passing title to the purchaser, nevertheless "retains actual possession" of the property.

As the statute provides for the record to be made in the "county where the holder of the property resides", this gives protection in most cases of conditional sales, but in a particular case it may be a difficult matter to determine the *residence* of the "holder" of the property. Nor is the residence of the holder as vital an element as the *location* of the property itself and hence the Act, in seeking to protect innocent persons as much as possible, requires recording in the county "in which the goods are first kept for use by the buyer after the sale."

On this point the draftsman in his notes to this section says:

"The desideratum is to have a record in the place where the goods are permanently kept. It is there that innocent purchasers and creditors will be misled by the apparent ownership of the buyer. Record in the place of the buyer's residence is of little importance, unless the goods are kept there. The goods will be kept in most instances in the place where they are delivered. The place of delivery is easily ascertained. There can be no mistake about its identity. Where the buyer resides may be a question of some complexity.

"It has seemed that the problem could best be solved by requiring filing in the place of permanent delivery, and following that requirement by provisions respecting removal of the goods from the county of original delivery."

The present statute in every case involves an inquiry into the question of the buyer's residence, *Kammeier v. Chauvet*, 171 N. W. (Iowa) 165, to determine not only whether the buyer is a resident of the State, and, if so, his exact place of residence; but whatever difficulty a person may experience is determining this question, even then he cannot be sure just where to look for a record, for if the goods are in the possession of the buyer's agent at a place different from the residence of the buyer, it must first be determined who is the "holder" within the meaning of the statute, before one can be sure of the place where the goods should be recorded. A later provision of the Act deals with the removal of the property from the first place of registration.

The present conditional sales statute²⁸ provides that in order to be effective against creditors and purchasers without notice, such sale must be "acknowledged by the vendor or vendee". The idea of the Act in expressly providing that acknowledgment is not nec-

²⁸ See note 12, *supra*.

essary is for the sake of uniformity, as but few states have such a requirement. In speaking of this provision, the draftsman has said:²⁹

"It is considered desirable on account of the peculiar provisions in some states requiring attestation or acknowledgment of conditional sale contracts. . . . It is highly desirable for conditional sellers doing interstate business to know either that all contracts must be acknowledged or attested, or that everywhere acknowledgment or attestation is superfluous."

The requirement that the instrument be acknowledged or attested, adds technicalities which if it does not result in faulty recording, preventing it from being effective, at least raises difficult questions as to the sufficiency of the record. *American Laundry Mach. Co. v. Everybody's Laundry*, 171 N. W. (Iowa) 161.

SECTION 7. [Fixtures.] It the goods are so affixed to realty, at the time of a conditional sale or subsequently as to become a part thereof and not to be severable wholly or in any portion without material injury to the freehold, the reservation of property as to any portion not so severable shall be void after the goods are so affixed, as against any person who has not expressly assented to the reservation. If the goods are so affixed to realty at the time of a conditional sale or subsequently as to become part thereof but to be severable without material injury to the freehold, the reservation of property shall be void after the goods are so affixed as against subsequent purchasers of the realty for value and without notice of the conditional seller's title, unless the conditional sale contract, or a copy thereof, together with a statement signed by the seller briefly describing the realty and stating that the goods are or are to be affixed thereto, shall be filed before such purchase in the office where a deed of the realty would be recorded or registered to affect such realty. As against the owner of realty the reservation of the property in goods by a conditional seller shall be void when such goods are to be so affixed to the realty as to become part thereof but to be severable without material injury to the freehold, unless the conditional sale contract, or a copy thereof, together with a statement signed by the seller briefly describing the realty and stating that the goods are to be affixed thereto, shall be filed before they are affixed, in the office where a deed would be recorded or registered to affect such realty.

At present there is no statutory provision with respect to conditional sales affecting fixtures generally,³⁰ though our court has declared in terms following very closely the idea expressed in the

²⁹ 3 Cornell Law Quarterly, p. 1 at p. 6.

³⁰ A few special cases are covered in Code §2051 which treats principally of conditional sales of railway equipment and rolling stock. See note 31, *infra*.

Act, that where a vendor sells property which is recorded as a conditional sale

"which it is understood will become a part of the realty by being attached to it, and that it cannot be removed without injury, and thereby places it within the power of the vendee to so attach it, and sell or mortgage it to innocent purchasers, the better and more just rule is that the vendor must suffer."

Allis-Chalmers Co. v. City of Atlantic, 164 Iowa 8. See also, *Hooven etc. Co. v. City of Atlantic*, 163 Iowa 380.

Whatever reason exists for protecting the seller in a conditional sale of chattels under ordinary circumstances, exists even though the goods are to become affixed to the realty of another, if proper protection is given to innocent buyers of the realty.

The Act has aimed to protect the seller only where such protection is practicable, that is, where the goods so sold are "severable without material injury to the freehold", and then only when there has been a special recording "in the office where a deed of the realty would be recorded", so that a purchaser of the realty, in order to be affected, may have a reasonable and convenient opportunity to become informed as to the rights of the seller in the conditional sale. As is stated in the draftsman's notes to this section: "If this record is in the same office where deeds of real property are recorded, the labor of searching for conditional sale contracts on the part of the prospective buyer or mortgagee of the land will be slight."

The necessity of the record being made where realty is recorded is apparent, for as said with reference to a chattel mortgage in *Bringholff v. Munzemaier*, 20 Iowa 513, the purchaser of realty would have

"no constructive notice of the plaintiff's right, because the plaintiff's mortgage was a chattel mortgage and recorded and indexed as such. . . . Any other rule would practically nullify the registry laws, or else introduce the startling doctrine that in examining the title to *real estate* the searcher must also examine the records of chattel mortgages."

Such a subject is a very proper one for which provision should be made by statute, for otherwise the various rights and liabilities of the parties in such situations can only be definitely ascertained through the slow process of working out each detail through court decision. The desirability of the statute and some of the special situations covered are stated by the draftsman as follows:

"If the property can be severed from the realty without material injury, it

seems desirable to give the conditional seller a chance to protect himself against dealers with the real estate by the making of a record. If this record is in the same office where deeds of real property are recorded, the labor of searching for conditional sale contracts on the part of the prospective buyer or mortgagee of the land will be slight.

"A distinction, however, is made between goods affixed to realty which have lost their identity and goods affixed to realty which can be readily severed. A separate sentence has also been inserted to cover the peculiar case of the sale of goods to a contractor to be affixed by him to the real property of another, in other words, the case of the validity of the conditional sale of a fixture as against the 'owner' of the realty."

SECTION 8. [Railroad Equipment or Rolling Stock.] No conditional sale of railroad, or street or interurban railway equipment or rolling stock shall be valid as against the purchasers and creditors described in Section 5, unless the contract shall be acknowledged by the buyer or attested in like manner as a deed of real property, and the contract, or a copy thereof, shall be filed or recorded in the office of [the Secretary of State]; and unless when any engine or car so sold is delivered there shall then be plainly and conspicuously marked upon each side thereof the name of the seller, followed by the word "owner."

This section covers in general the same situations as are now provided for in Code Suppl. §§2051³¹ and 2052, though there are a

³¹ Code Suppl. §2051. "In any contract for the sale of railroad or street railway equipment or rolling stock or power house, electric or other equipment of street or interurban railways or of electric light and power companies or of steam heating companies, such equipment including engines, boilers, generators, switch boards, transformers, motors and other machinery and appliances, it may be agreed that the title thereto, although possession thereof be delivered immediately or at any time or times subsequently, shall not vest in the purchaser until the purchase price shall be fully paid, or that the seller shall have and retain a lien thereon for the unpaid purchase money. In any contract for the leasing or hiring of such property, it may be stipulated for a conditional sale thereof at the termination of such contract, and that the rentals or amounts to be received under such contract may, as paid, be applied and treated as purchase money, and that the title to the property shall not vest in the lessee or bailee until the purchase price shall have been paid in full, and until the terms of the contract shall have been fully performed, notwithstanding delivery to and possession by such lessee or bailee; but no such contract shall be valid as against any subsequent judgment creditor, or subsequent bona fide purchaser for value without notice unless

1. The same shall be evidenced by an instrument executed by the parties and acknowledged by the vendee, or lessee, or bailee, as the case may be, in the same manner as deeds are acknowledged or proved;
2. Such instrument shall be filed for record in the office of the secretary of state;
3. Each locomotive engine, stationary engine, boiler, switch board, trans-

number of differences to be noted.³² From the character of the property and the nature of its use, this is a subject which makes specially desirable uniformity as is shown by the fact that nearly all states already have legislation along this line.

While the Act covers only "railroad, or street or interurban railroad equipment or rolling stock", our statute adds "or power house", while it might seem to leave out rolling stock of interurban railways, since it mentions "railroad or street railway equipment or rolling stock", making no mention here of interurban railways which it specially mentions immediately following in including "equipment of street or interurban railways."

In addition to the classes of property named in the Act the Iowa statute also specifies "electric or other equipment . . . of electric light and power companies or of steam heating companies." If it is deemed desirable to add these classes to the Act this might be done in a sub-section without interfering materially with the principle of uniformity. However, there seems no particular advantage in including them under the special provisions of this section, and it would seem that sufficient protection, considering the character of the goods and the manner of their use, would be afforded under the general provisions of the Act as applicable to other goods or the special provision concerning fixtures. The protection of these special classes of property in this State was, no doubt, deemed necessary because of the absence of any provision concerning fixtures.

Protection is provided in the present statute to "subsequent judgment creditors" in addition to "bona fide purchasers for value without notice". The Act makes this section apply, as in the case

former, motor, other piece of machinery or appliance or car sold, leased or hired as aforesaid shall have the name of the vendor, lessor or bailor plainly marked on each side thereof, followed by the word 'owner', 'lessor' or 'bailor', as the case may be."

³² Code Suppl. §2052. "The contracts herein authorized shall be recorded by the secretary of state in a book of records to be kept for that purpose, and, on payment in full of the purchase money and the performance of the terms and conditions stipulated in any such contract, a declaration in writing to that effect may be made by the vendor, lessor or bailor, or his or its assignee, which declaration may be made on the margin of the record of the contract, duly attested, or it may be made by a separate instrument, to be acknowledged by the vendor, lessor or bailor, or his or its assignee, and recorded as aforesaid. For such services the secretary of state shall be entitled to a fee of ten cents per hundred words for recording each of the contracts and each of said declarations but in no case shall a fee be less than one dollar and a fee of one dollar for noting such declaration on the margin of the record."

of all other conditional sales, to any creditor who "acquires by attachment or levy a lien" upon the goods. Nor does any reason appear why protection should not be given to the same classes as are protected under the general provisions with reference to conditional sales.

The place of filing is left to the discretion of each jurisdiction in which the Act may be adopted, but the provisions for recording in the office of the Secretary of State, as required by the Iowa statute is the most usual. In requiring that the contract "be acknowledged by the buyer or attested in like manner as a deed of real property" the Act follows the general wording of the Iowa statute.

With reference to marking property sold, the Act only includes "any engine or car so sold." The Iowa statute specifies many other pieces of equipment. The reason which dictates the marking of rolling stock certainly has no bearing on the stationary equipment of a power house, and there seems no reason for making a special provision for machinery used in one line of business which is not made with reference to like machinery used in other lines of business. The simplicity of the Act in this respect seems much more desirable.

SECTION 9. [Conditional Sale of Goods for Resale.] When goods are delivered under a conditional sale contract and the seller expressly or impliedly consents that the buyer may resell them prior to performance of the condition, the reservation of property shall be void against purchasers from the buyer for value in the ordinary course of business, and as to them the buyer shall be deemed the owner of the goods, even though the contract or a copy thereof shall be filed according to the provisions of this act.

No provision has been made in the Iowa statute as to goods bought for resale, but the general rule, in the absence of legislation, is that the seller is estopped from setting up his right under such circumstances.³³ It would seem that the ruling made in the case of fixtures in *Allis-Chalmers Co. v. City of Atlantic*, 164 Iowa 8, would be adopted, though in this case the estoppel was as to a particular third person known to the seller as the one to whom the property was to be sold. In limiting the decision to such an individual the court says, "As against a plea of estoppel arising in such a case, we think constructive notice of the claim would not be sufficient."

The same reasoning should apply when the seller gives the goods into the possession of the buyer, knowing and intending that the buyer should offer them for sale to the public, as when the seller

³³ See *MECHEM ON SALES*, §601.

gives them to the buyer for the purpose of representing them to a particular third person as the goods of the buyer.³⁴ In either case the seller should be estopped from setting up his title, for in each case a person has been induced to act to his detriment by the misrepresentations which the seller has aided in having brought about.

In the draftsman's notes to the Act it is said:

"Where the same seller attempts to reserve the property in himself and at the same time to allow a resale by a retailer in the ordinary course of business, he is doing two inconsistent things. A purchaser from a retailer in the ordinary course of business ought not to be obliged to examine the records to learn whether the retailer has title or whether title has been reserved under a conditional sale contract. That the goods have been put into the retailer's stock with the consent of the wholesaler is conclusive evidence that they are there for sale and that the retailer has title or the right to convey. The mere constructive notice of the record of the contract ought not to prevail as against a buyer from a retailer in the ordinary course of business."

SECTION 10. [Filing.] The filing officer shall mark upon the contract or copy filed with him the day and hour of filing and shall file the contract or copy in his office for public inspection. He shall keep a separate book in which he shall enter the names of the seller and buyer, the date of the contract, the day and hour of filing, a brief description of goods, the price named in the contract and the date of cancellation thereof; except that in entering the contracts mentioned in Section 8 the [Secretary of State] shall record either the sum remaining to be paid upon the contract or the price of the goods. Such book shall be indexed under the names of both seller and buyer. For filing and entering such contract or copy the filing officer shall be entitled to a fee of [ten cents], except that for filing and entering a contract described in Section 8 the [Secretary of State] shall be entitled to a fee of [one dollar].

The only provisions for filing under the present statute are those stated for chattel mortgages. This section of the Act requires that a separate book be kept for conditional sales and in no way affects provisions relating to chattel mortgages. The present statute³⁵

³⁴ See discussion of *Wright v. Barnard Bros.*, *supra*, p. 136.

³⁵ 38 G. A., Ch. 352, §7. "The county recorder shall keep an index book in which shall be entered a list of mortgages of personal property, or extensions thereof, bills of sale, and other instruments affecting title to or incumbrance of personal property, which may be filed under this act. Such book shall be ruled into separate columns with appropriate heads, and shall set out, the time of reception, the name of mortgagor, the name of mortgagee, the date of instrument, the amount secured, when due, the nature of the property mortgaged, where located, extension, when released, and remarks, and the proper entry shall be made under each such heads. Under the head of 'Prop-

provides that a book be kept "in which shall be entered a list of mortgages of personal property, . . . bills of sale, and other instruments affecting title to or incumbrance of personal property", and the things of which record is to be made as set out in 38 G. A. ch. 352, §7 and Code §§2907,³⁶ 2908³⁷ do not differ materially from those mentioned in the Act. The Act does not require a statement of the due date of the instrument but this is not necessary because the Act makes the recording effective only for a limited period regardless of the date of maturity.

As the Act provides for the keeping of a "separate book" for conditional sales, the list of any other transactions which are to be recorded should still be kept in the chattel mortgage book, and the sections above mentioned may remain as at present, as sales other than conditional sales are within their scope. The present statute provides for "bills of sale and other instruments affecting title to or incumbrance of personal property, *which may be filed under this Act.*" If the Conditional Sales Act is adopted, the filing of such instruments will be specially provided for in a "separate book" and are not therefore to be filed under the provisions of 38 G. A.,

erty mortgaged', it will be sufficient to enter a general description of the kind or nature of the property."

38 G. A., Ch. 352, §3. "Upon receipt of any such instrument, the recorder shall indorse thereon the time of receiving it, and shall file the same in his office for the inspection of all persons, and such filing shall have the same force and effect as if recorded at length; upon request of person presenting instrument for filing, the county recorder shall issue a receipt therefor, and such receipt shall describe instrument as to grantor, grantee, date, consideration and date filed."

³⁶ Code §2907. "The recorder must keep an index book for instruments of the above description, having the pages thereof ruled so as to show in parallel columns, in the manner hereinafter provided in case of deeds for real property:

1. Each mortgagor or vendor;
2. Each mortgagee or vendee;
3. The date of filing the instrument;
4. The date of the instrument;
5. Its nature;
6. The page and book where the record is to be found."

³⁷ Code §2908. "Whenever any written instrument of the character above contemplated is filed for record, the recorder shall note thereon the day and hour of filing the same, and forthwith enter in his index book all the particulars required in the preceding section, except the sixth; and from the time of said entry the sale or mortgage shall be deemed complete as to third persons, and have the same effect as though it had been accompanied by the actual delivery of the property sold or mortgaged."

Ch. 352, §7, which will still cover cases of transactions other than chattel mortgages.

The fee for filing contracts other than those concerning railroad equipment or rolling stock, is suggested as ten cents in the Act, while the present charge under the chattel mortgage statute is twenty-five cents.³⁸ The amount to be charged does not materially affect the question of uniformity, the only idea of the Act in fixing so small an amount being "to encourage sellers to file their contracts". The present charge of twenty-five cents may as well be retained.

With reference to contracts concerning railroad equipment or rolling stock, the present statute, Code Suppl. §2052,³⁹ requires that "the contract . . . shall be recorded," while the Act permits the recording of "either the sum remaining to be paid upon the contract or the price of the goods". The filing fee of one dollar is the same as that now provided in the statute.

SECTION 11. [Refiling.] The filing of conditional sale contracts provided for in Sections 5, 6 and 7 shall be valid for a period of three years only. The filing of the contract provided for by Section 8 shall be valid for a period of fifteen years only. The validity of the filing may in each case be extended for successive additional periods of one year from the date of refiling by filing in the proper filing district a copy of the original contract within thirty days next preceding the expiration of each period, with a statement attached signed by the seller, showing that the contract is in force and the amount remaining to be paid thereon. Such copy, with statement attached, shall be filed and entered in the same manner as a contract or copy filed and entered for the first time, and the filing officer shall be entitled to a like fee as upon the original filing.

The present statute⁴⁰ makes the record effective for "five years

³⁸ 38 G. A., Ch. 352, §11. "The fees to be collected by the county recorder under this act shall be as follows: For filing any mortgage, bill of sale, extension agreement, release of mortgage or other instrument affecting the title to or incumbrance of personal property twenty-five cents each. For certified copies of such instruments, fifty cents for the first four hundred words and ten cents for each one hundred additional words or fraction thereof."

³⁹ See note 32, *supra*.

⁴⁰ 38 G. A., Ch. 352, §4. "Every mortgage so filed shall be void as against the creditors of the person making the same, or as against subsequent purchasers or mortgagees in good faith, after the expiration of five years after the maturity of the debt thereby secured, unless an extension agreement, duly executed by the mortgagor shall be filed with the instrument to which it relates, and such extension agreement shall operate to continue the lien in the same manner as the original instrument."

after the maturity of the debt thereby secured." The Act provides that the recording shall be effective for three years after the record is made. As to this period, it is stated in the draftsman's notes to this section: "The ordinary conditional sale contract will be performed or broken before that time. If a contract extends over a period longer than three years, a fresh record should be made at the end of three years." The present provision, that the recording shall be effective for "five years after the maturity of the debt thereby secured" lacks definiteness and makes the search of the record rather difficult, since one cannot tell how far back such search must be extended in a particular case, since he does not know when the debt secured by the instrument matures, and in fact he usually does not know that there is any debt at all, while the provisions of the Act make unnecessary an examination of the records beyond the three year period. The debt, if there is one, may mature in twelve months or twelve years, and one searching the record under the present Iowa statute must at his peril discover this fact, which must necessarily involve a search over the whole record. The result is that though the seller under a recorded conditional sale is fully protected, no attention has been paid to the other, fully as important, situation for which the statute was originally framed, that is, adequate protection to an innocent purchaser from the buyer, or other person securing or deriving rights through him. Certainly his protection is not adequate unless, by a reasonable search of the record he can get actual knowledge of the situation with respect to the particular property in question.

The Act provides for refiling "for successive additional periods of one year", while the present statute provides for an "extension agreement" which "shall operate to continue the lien in the same manner as the original instrument." The definite period provided in the Act is much more desirable, since it will necessitate that any one making a search should go back over the record only for the period provided in the Act, while the statute leaves the effectiveness of the refiling as indefinite as the length of time during which the original filing was to be effective.

The provisions that the refiling shall be within thirty days preceding the expiration of the filing period, together with statements showing that the contract is in force and the amount remaining to be paid, give desirable information not required by the present chattel mortgage statute.

With reference to the refiling of conditional sales concerning railroad equipment and rolling stock, the present statute, §§2051

and 2052, provides for no limitation as to the length of time the recording shall be effective. Though the record of sales of this character should give protection for a much longer period than that provided for ordinary goods, yet there is certainly as great a necessity for definiteness and certainty and the fixing of some time limit; hence, the desirability of the provision limiting the effectiveness of the recording to a fifteen year period and the provision for refileing for successive periods of one year each.

SECTION 12. [Cancellation of Contract.] After the performance of the condition, upon written demand delivered personally or by registered mail by the buyer or any other person having an interest in the goods, the seller shall execute, acknowledge and deliver to the demandant a statement that the condition in the contract has been performed. If for ten days after such demand the seller fails to mail or deliver such a statement of satisfaction, he shall forfeit to the demandant five dollars [\$5.00] and be liable for all damages suffered. Upon presentation of such statement of satisfaction the filing officer shall file the same and note the cancellation of the contract and the date thereof on the margin of the page where the contract has been entered. For filing and entering the statement of satisfaction the filing officer shall be entitled to a fee of [ten cents], except that the [Secretary of State] shall be entitled to a fee of [fifty cents] for filing and entering a statement of the satisfaction of a contract described in Section 8.

The present statute provides,⁴¹ that "any mortgage or pledge of personal property may be released of record", in certain ways stated, but no provision is made as in the case of real estate mortgages so as to bring about such release. Though the wording of the statute refers only to a "mortgage or pledge" and does not mention conditional sales, it is no doubt intended to apply to such instruments, for the next section⁴² reads: "When any chattel mort-

⁴¹ 38 G. A., Ch. 352, §8. "Any mortgage or pledge of personal property may be released of record, by filing with the original instrument, a duly executed satisfaction piece or release of mortgage; or by the mortgagee or his authorized agent indorsing a satisfaction of said mortgage on the index book under the head of 'Remarks' in the same manner as mortgages are now released by marginal satisfaction, and when so released on index book, the recorder shall enter a memoranda thereof on the original instrument."

⁴² 38 G. A., Ch. 352, §9. "When any chattel mortgage or other instrument of writing or indebtedness which may have been filed as herein provided shall have been satisfied, it shall be the duty of the recorder, after making a proper entry of such satisfaction in the index book or record where the original instrument is recorded, to return the original instrument, with any extension, or

gage or other instrument of writing or indebtedness . . . shall have been satisfied," but it is much better to have statements referring to conditional sales directly rather than to leave to inference the effect of such legislation upon them. The Act states definitely not only the rights and obligations of buyer and seller in this regard, but by placing a penalty upon the seller makes less likely his arbitrary refusal to give such a "duly executed satisfaction piece" as is mentioned in the statute. Under the present statute the buyer in a conditional sale might file such document if he can get it, but no provision is made for his being able to secure it. The same defect is to be noted in the further provision of the statute that there may be a release by the "mortgagee or his authorized agent indorsing a satisfaction" on the record. It is most desirable that the obligation, and the procedure necessary to enforce it, be set out fully and definitely as is done in the Act.

The provision insuring the proper entry on the record by the proper officer though differing in detail and in wording, effects no substantial change.

The present fee for filing a release is twenty-five cents, while that suggested in the Act is ten cents. The amount in either case is so small as not to deter any one from recording any sale of this character, though the general policy of the Act is to encourage the recording of such transactions by making it as inexpensive as possible. The question of the amount, however, does not materially affect the principle of uniformity sought for, and is a matter of local policy.

SECTION 13. [Prohibition of Removal or Sale Without Notice.] Unless the contract otherwise provides, the buyer may, without the consent of the seller, remove the goods from any filing district and sell, mortgage or otherwise dispose of his interest in them; but prior to the performance of the condition, no such buyer shall

release, thereto attached, to the mortgagor or person executing the same, upon request therefor."

The Act contains no provision covering 38 G. A., Ch. 352, §10: "*Destruction of mortgage—date of, recorded.* In case such instrument, with the extension or release thereof, if any, be not returned as hereinbefore provided within five years from the maturity thereof, or the maturity of any extension thereof, the recorder shall destroy such chattel mortgages with the extension or releases thereto attached, or other instruments or writing relating thereto, by burning the same in the presence of the board of county supervisors, or a committee appointed by the board of supervisors from their own number, to superintend the same, and when so destroyed the date shall be entered on the index record under 'Remarks'." This may be added in a sub-section if deemed essential, without affecting the question of uniformity.

remove the goods from a filing district in which the contract or a copy thereof is filed, except for temporary uses for a period of not more than thirty days, unless the buyer not less than ten days before such removal shall give the seller personally or by registered mail written notice of the place to which the goods are to be removed and the approximate time of such intended removal; not prior to the performance of the condition shall the buyer sell, mortgage or otherwise dispose of his interest in the goods, unless he, or the person to whom he is about to sell, mortgage or otherwise dispose of the same, shall notify the seller in writing personally or by registered mail of the name and address of the person to whom his interest in the goods is about to be sold, mortgaged or otherwise transferred, not less than ten days before such sale, mortgage or other disposal. If any buyer does so remove the goods, or does so sell, mortgage or otherwise dispose of his interest in them without such notice or in violation of the contract, the seller may retake possession of the goods and deal with them as in case of default in payment of part or all of the purchase price. The provisions of this section regarding the removal of goods shall not apply, however, to the goods described in Section 8.

Since the purchaser in a conditional sale is in truth the owner of the goods with all his obligations and liabilities, it is desirable that he be allowed such freedom with reference to the goods as is consistent with the security of the seller. Under the present statute no regulation other than a criminal liability⁴³ is provided. The positions of both buyer and seller make necessary some definite regulation as to the removal or dealing with the goods, if each is to be given fair protection in his rights. As the seller usually has the advantage of position in such transactions the lack of statutory provision on this subject is apt to result in one-sided agreements in the contract which bear very harshly upon the buyer, for, in the absence of such agreement, if there is no statutory regulation of the matter, the buyer may greatly embarrass the seller in the protection of his security and the enforcement of his rights by the removal of the property, and this, without necessarily any fraudulent intent so as to bring him within the provisions of the criminal statute. The Act, however, expressly permits the parties, by

⁴³ 38 G. A., Ch. 313. "If any mortgagor of personal property or purchaser under a conditional bill of sale, while the mortgage or conditional bill of sale upon it remains unsatisfied, willfully and with intent to defraud, destroys, conceals, sells, or in any manner disposes of the property covered by such mortgage or conditional bill of sale without the written consent of the then holder of such mortgage or conditional bill of sale, he shall be guilty of larceny and punished accordingly."

special contract, to make such agreement upon the matters covered in this section, as they may see fit.

The arguments in favor of the provisions here given are very clearly set out in the draftsman's notes to this section :

"Unless there is a record of the conditional sale contract in the place in which the goods are located, the public is apt to be defrauded. Innocent buyers and chattel mortgagees will naturally examine only the records of the city or county in which the goods are located. They are not apt to know where the goods were originally delivered, or where the possessor of them lived, when he bought them. It seems desirable to compel the seller to make a new record of the contract when the goods are moved into a new county, or for the first time brought into the state. In order that it may be reasonable to compel the seller to make this record, every effort must be made to give the seller notice of the removal. He will naturally learn in many cases of such removal, because he will be collecting the part payments and will be looking for the buyer. But if a civil penalty is placed upon removal by the buyer without notice to the seller, the chances of the seller knowing of such removal and being able to file the contract in the new county will be greatly increased. In view of the danger to the seller if the goods are taken into a new county where there is no record, the penalty of allowing the seller to retake the goods as on default, does not seem too harsh. . . .

"It seems unreasonable to compel the buyer to get the consent of the seller to a removal to a new county or a new state unless he has agreed to such a provision in his original contract. Such consent might be withheld unjustly by the seller. If the seller knows of the removal, he can refile the contract. Such reffiling is what is desired, not an absolute prohibition against moving the goods about from place to place.

"Conditional sale contracts frequently contain provisions prohibiting removal and allowing retaking by the seller on that account and such provisions have been enforced by the courts.

"The interest of the buyer ought to be assignable before complete payment, but the assignment is of so much importance to the seller that he should receive notice of it as soon as possible. The section requires notice to be given under penalty of allowing the seller to treat the buyer as if in default. If the seller is to look to another than the original buyer for his payments, he should know that fact as soon as possible. If the seller is not obliged to look to that other for the payments, he should know that possession of the goods has passed to another or that another claims some interest in the goods."

SECTION 14. [Refiling on Removal.] When, prior to the performance of the condition, the goods are removed by the buyer from a filing district in this state to another filing district in this state in which such contract or a copy thereof is not filed, or are removed from another state into a filing district in this state where such contract or copy is not filed, the reservation of the property in the seller shall be void as to the purchasers and creditors described in Section 5, unless the conditional sale contract or a copy thereof shall be filed in the filing district to which the goods are removed,

within ten days after the seller has received notice of the filing district to which the goods have been removed. The provisions of this section shall not apply, however, to the goods described in Section 8. The provisions of Section 11 regarding the duration of the validity of the filing and the necessity for refiling shall apply to contracts or copies which are filed in a filing district other than that where the goods are originally kept for use by the buyer after the sale.

The present statute⁴⁴ provides only for the furnishing of a certified copy of the instrument so that it "may be filed in other counties of the state". As the seller is sufficiently protected after the original recording there is often but little inducement to him to go to the trouble of recording elsewhere, which is, after all, largely for the protection of the public. It is to the great merit of the Act that its provisions are aimed at the protection of innocent persons who may seek to acquire some rights in the property, as well as to give protection to the seller. Though some obligation is here placed upon the seller, his own rights are further safeguarded, while he is not required to assume any material burden. The public, on the other hand, has no way whatever of being protected unless there is some such provision as that given in the Act.

The protection which the seller may wish to secure under the present statute to prevent the goods leaving the hands of the buyer, may induce him to record the transaction in another district to which the goods may be taken, but, even in this case, the seller is not assured of receiving notice, and may have no opportunity to protect himself through further recording if he should deem such recording desirable.

⁴⁴ 38 G. A., Ch. 352, §5. "A duplicate or copy of such mortgage, bill of sale, or other instrument filed under the provision of this act, shall be supplied by the county recorder upon request of any party in interest, and the payment of fees therefor, as hereinafter stipulated. Such duplicate or copy shall be duly certified by the county recorder and may be filed in other counties of the state in the same manner as herein provided."

No provision is made in the Act for a certified copy to be received in evidence, as is provided in 38 G. A., Ch. 352, §6: "*Copy in evidence.* A copy of such original instrument, duly certified by the county recorder in whose office the same shall have been filed, shall be received in evidence in all suits or actions to which it may be applicable; and if in any suit or action, the due execution of such instrument or its genuineness be questioned in such manner as to render the production of the original instrument desirable or necessary, then the same may be produced by the recorder of the county in obedience to a proper judicial process or court order." This may be added in a sub-section if deemed advisable.

But probably the more important matter is the protection of the public so that innocent buyers may not be defrauded. This is the fundamental proposition aimed at in the present provision. Yet, if recording is not required of the seller in the new district into which the goods are removed then there is just as great a chance for injury to the rights of innocent third persons in that district, as there was to such persons in the district where the goods were "first kept for use by the buyer after the sale."

SECTION 15. [Fraudulent Injury, Concealment, Removal or Sale.] When, prior to the performance of the condition, the buyer maliciously or with intent to defraud, shall injure, destroy or conceal the goods, or remove them to a filing district where the contract or a copy thereof is not filed, without having given the notice required by Section 13, or shall sell, mortgage, or otherwise dispose of such goods under claim of full ownership, he shall be guilty of a crime and upon conviction thereof shall be imprisoned [in the county jail] for not more than [one year] or be fined not more than [\$500] or both.

This section is very similar to the recently enacted statute⁴⁵ fixing the same penalty with reference to conditional sales that had previously been enacted for chattel mortgages only,⁴⁶ but adds to the list of prohibited dealings with the goods, "to remove them to a filing district where the contract or a copy thereof is not filed, without having given the notice required by section 13", in this way giving sufficient protection to the seller without making it impossible for the buyer to deal with the goods. As section 13 gives the buyer the right to deal with the goods under certain conditions, the present section provides a penalty for disposing of the goods "under claim of full ownership", and also includes the mortgaging of the goods under like conditions. The penalty here provided is not as severe as that given in the present statute, which makes the buyer guilty of larceny, the punishment for which is imprisonment in the penitentiary not more than five years, when the value of the goods is over twenty dollars.⁴⁷

The penalty provided in the Act is certainly sufficient to deter one from evil doing, and not so severe as to prevent its enforcement as a practical matter. However, the penalties properly to be imposed are merely matters of judgment and the fixing of penalties other than those suggested in the Act would not interfere with the

⁴⁵ See note 43, *supra*.

⁴⁶ Code §4852.

⁴⁷ Code §4831.

objects and purposes of uniformity aimed at in the Act. It is only necessary that there be penalties sufficient to insure the seller against improper and fraudulent conduct on the part of the buyer.

SECTION 16. [Retaking Possession.] When the buyer shall be in default in the payment of any sum due under the contract, or in the performance of any other condition which the contract requires him to perform in order to obtain the property in the goods, or in the performance of any promise, the breach of which is by the contract expressly made a ground for the retaking of the goods, the seller may retake possession thereof. Unless the goods can be retaken without breach of the peace, they shall be retaken by legal process; but nothing herein shall be construed to authorize a violation of the criminal law.

Though the right of the seller to retake the goods on default is usually a matter expressly contracted for, it is, probably, a right which the seller would have without such agreement⁴⁸ as it would seem to be fundamentally connected with this method of providing security through the retention of title. *American Soda Fountain Co. v. Dean Drug Co.*, 136 Iowa 312. But the exercise of the right whether expressly contracted for or not, is, of course, dependent entirely upon default on the part of the buyer. *Meyers v. Townsend*, 103 Iowa 569; *American Soda Fountain Co. v. Dean Drug Co.*, *supra*; *Elijah & Winne v. Mottinger*, 161 Iowa 371.

Later sections put limitations upon the seller so as to properly protect the buyer's rights. The exact rights of the parties in this situation should be set out rather than that all the details be left to be worked out through decisions. No provisions on this subject are contained in the present statutes; but the right of the seller to insist upon the terms of his bargain and retake the goods under rather extreme circumstances of hardship upon the buyer has been recognized. *Flaherty v. Ginsberg*, 135 Iowa 743.

SECTION 17. [Notice of Intention to Retake.] Not more than forty nor less than twenty days prior to the retaking, the seller, if he so desires, may serve upon the buyer personally or by registered mail a notice of intention to retake the goods on account of the buyer's default. The notice shall state the default and the period at the end of which the goods will be retaken, and shall briefly and clearly state what the buyer's rights under this act will be in case they are retaken. If the notice is so served and the buyer does not

⁴⁸ "It is generally provided in contracts of conditional sale that on default of the buyer the seller may reclaim possession of the goods, and even in the absence of such a provision it has been held to be implied." WILLISTON ON SALES, §579.

perform the obligations in which he has made default before the day set for retaking, the seller may retake the goods and hold them subject to the provisions of Sections 19, 20, 21, 22 and 23 regarding resale, but without any right of redemption.

There is no provision of this kind in the Iowa statutes, and, of course, no such restrictions or limitations are placed upon the parties when the right to retake the goods exists only because of express contract between the parties. The purpose of the section is set forth in the draftsman's notes as follows:

"The object of this section is to enable the seller to avoid unnecessary expense and trouble. Often the seller without this section would have to make one trip to the buyer's town to retake the goods, then store the goods at considerable expense during the redemption period, and lastly make a second trip to the buyer's town to resell the goods. If the buyer has from twenty to forty days' notice that he must pay up or lose the goods, his rights are as well protected as if he had a ten days' period of redemption after the goods have been retaken. The object is to give the buyer a reasonable time to raise the back payments. Either a notice of intention to retake or a period of redemption after retaking will give the buyer protection. If the former enables the seller to avoid useless trouble and expense, the seller should have the option of taking either method."

SECTION 18. [Redemption.] If the seller does not give the notice of intention to retake described in Section 17, he shall retain the goods for ten days after the retaking within the state in which they were located when retaken, during which period the buyer, upon payment or tender of the amount due under the contract at the time of retaking and interest, or upon performance or tender of performance of such other condition as may be named in the contract as precedent to the passage of the property in the goods, or upon performance or tender of performance of any other promise for the breach of which the goods were retaken, and upon payment of the expenses of retaking, keeping and storage, may redeem the goods and become entitled to take possession of them and to continue in the performance of the contract as if no default had occurred. Upon written demand delivered personally or by registered mail by the buyer, the seller shall furnish to the buyer a written statement of the sum due under the contract and the expense of retaking, keeping and storage. For failure to furnish such statement within a reasonable time after demand, the seller shall forfeit to the buyer [\$10] and also be liable to him for all damages suffered because of such failure. If the goods are perishable so that retention for ten days as herein prescribed would result in their destruction or substantial injury, the provisions of this section shall not apply, and the seller may resell the goods immediately upon their retaking. The provision of this section requiring the retention of the goods within the state during the period allowed for redemption shall not apply to the goods described in Section 8.

There are no provisions in our present conditional sales statute with reference to foreclosure, redemption, and similar matters having to do with the enforcing of the security given in such a transaction. Though the conditional sale is much like the chattel mortgage in many respects and is often given to accomplish exactly similar purposes, yet the statute⁴⁹ only provides that it be "recorded the same as chattel mortgages". As to matters such as are covered by this and the following sections of the Act, the courts may by analogy, apply practically the same rules as have been established for redemption of chattel mortgages,⁵⁰ but as they are not bound to do so, it leaves every detail as a matter of litigation to be finally settled only by the court of last resort, since the two situations are entirely distinct and different. *Kammeir v. Chauvet*, 171 N. W. (Iowa) 165.

The detailed provisions, as set forth in the Act, are almost a matter of necessity if the conditional sale is to be used extensively as a form of security. The object sought for in the Act is thus set forth by the draftsman:

"The theory of the following sections is that a conditional sale is practically equivalent to a chattel mortgage, and that the rights of buyer and seller in the conditional sale ought to coincide with those of chattel mortgagor and mortgagee as nearly as possible. Hence the buyer is given the right of redemption after default. It seems but little hardship on the seller to compel him to retain the goods within the reach of the buyer for ten days and allow the buyer to redeem the goods, if he can raise the money. In ten days there should be opportunity to borrow the money, or to obtain it through the receipt of salary or wages. To extend the period unduly imposes a hardship upon the seller in every case, and will benefit a buyer only in rare instances. Experience shows that if he does not do so promptly he seldom attempts to redeem. It is essential that the buyer should be able to discover just how much is claimed to be due on the contract and as a result of the retaking. The seller should furnish a written statement of this. The fixing of a small penalty for failure to deliver such a statement may stimulate promptness on the part of the seller."

SECTION 19. [Compulsory Resale by Seller.] If the buyer does not redeem the goods within ten days after the seller has retaken possession, and the buyer has paid at least fifty per cent of the purchase price at the time of the retaking, the seller shall sell them at public auction in the state where they were at the time of the retaking, such sale to be held not more than thirty days after the retaking. The seller shall give to the buyer not less than ten days' written notice of the sale, either personally or by registered mail,

⁴⁹ See note 12, *supra*.

⁵⁰ See WILLISTON ON SALES, §337, quoted note 7, *supra*; see also MECHEM ON SALES, §583.

directed to the buyer at his last known place of business or residence. The seller shall also give notice of the sale by at least three notices posted in different public places within the filing district where the goods are to be sold, at least five days before the sale. If at the time of the retaking \$500 or more has been paid on the purchase price, the seller shall also give notice of the sale at least five days before the sale by publication in a newspaper published or having a general circulation within the filing district where the goods are to be sold. The seller may bid for the goods at the resale. If the goods are of the kind described in Section 8, the parties may fix in the conditional sale contract the place where the goods shall be resold.

In the absence of statutory provision to the contrary, agreements for forfeitures in case of default are quite generally inserted in conditional sale contracts and receive enforcement by the great majority of courts, while some have permitted forfeitures even in the absence of express agreement upon the subject.⁵¹ Such agreements are not necessarily unfair since the depreciation in many classes of goods is often very great, "and in the very nature of such security it rapidly deteriorates in value, and loss is bound to accrue to the seller if he does not insist upon performance by the other party with some degree of stringency." *Flaherty v. Ginsberg*, 135 Iowa 743.

The difference in saleable value of new and second hand goods is also very great, and this is true in most cases even though the injury or damage to the goods is practically negligible. Where, however, a large proportion of the purchase price has been paid, an extreme hardship may be worked upon the unfortunate buyer who has neglected or been unable to meet all the terms of the agreement.

Though agreements for forfeitures have been concerned in many cases, the Iowa court has not directly passed upon their validity or effect, and seems to have been careful to avoid definite statements with reference thereto. *Richards v. Hellen*, 153 Iowa 66; *Elijah & Winne v. Mottinger*, 161 Iowa 371. In one case, however, it

⁵¹ "The right given expressly or impliedly to retake possession cannot fairly be considered as meaning a right to rescind the transaction by putting the buyer in *statu quo*. So long as courts treat the question as one to be determined solely by the provisions of the contract, the conclusion can rarely be avoided that the seller may resume possession and hold all that he has received." WILLISTON ON SALES, §579.

In *Mohler v. Guest Piano Co.*, 172 N. W. (Iowa) 302, it is said "the vendor may establish his property in the goods without . . . repaying a partial payment made by the vendee." But the case decided that plaintiff's petition, asking for recovery of payments made, was demurrable, because it "demands judgment for the payments without any deduction for use and depreciation."

is said by way of dictum that though the contract "gave to the seller a right to declare a forfeiture upon default of payment . . . a court of equity has power under some circumstances to declare such a contract mere security, and to protect the purchaser from unconscionable forfeiture." *Gigray v. Mumper*, 141 Iowa 396. The attitude of the court in the above case is very plainly that the conditional sale should be treated as far as possible as security and the rights of the parties adjusted as in chattel mortgage, the case being one in which "foreclosure" of a conditional sale contract was decreed.

With reference to the protection of the buyer which is secured by the compulsory sale here provided for, the draftsman's notes to this section contain the following comments:

"Many buyers of goods on conditional sale contracts are men of small means, little versed in the law and unfamiliar with correct business methods. They will not, it is believed, be apt to take advantage of an optional resale provision. They will not ordinarily know of it. It may be said that, if they are careless with respect to their own rights, they do not deserve protection. But the answer is that they frequently will not know what their own rights are, that they are a class of buyers who are frequently very needy and ignorant.

"Under this statute a compulsory resale is provided for only where the buyer has paid a considerable portion of the purchase price, namely, fifty per cent. If he has paid less, statistics show that nothing is realized for the buyer on a resale. The depreciation of the goods more than eats up the buyer's equity. Where there is no chance of benefiting the buyer, a compulsory resale is a useless and expensive formality. If the buyer wants a resale for the purpose of determining his equity, he may, under the provisions of the following section demand it, even though he has paid only ten per cent of the price. But it seems undesirable to require such resale as a matter of law in cases where business experience shows that it can do no good.

"The last sentence of this section gives greater liberty as to the place of sale to the parties in the case of the resale of railroad equipment."

The situation will be most unusual where the protection of a buyer, who "has paid at least fifty per cent of the purchase price" will not require a compulsory resale of the goods in order to be properly protected in his rights. Our law with reference to mortgages of real estate has made no distinction between the unfortunate and the careless and negligent debtor, and as many installment contracts in the form of conditional sales are a temptation to the improvident, the law should not lend its aid to the shrewd and experienced seller who seeks to take advantage of the poor or improvident buyer. The provision that "the seller may bid for the goods at the resale" gives him sufficient protection if the goods are

not readily saleable or do not, in the particular instance, bring a good price.

The present situation in this State calls for express legislation to make definite and certain the questions concerned with forfeiture.

SECTION 20. [Resale at Option of Parties.] If the buyer has not paid at least fifty per cent of the purchase price at the time of the retaking, the seller shall not be under a duty to resell the goods as prescribed in Section 19, unless the buyer serves upon the seller, within ten days after the retaking, a written notice demanding a resale, delivered personally or by registered mail. If such notice is served, the resale shall take place within thirty days after the service, in the manner, at the place and upon the notice prescribed in Section 19. The seller may voluntarily resell the goods for account of the buyer on compliance with the same requirements.

This section prevents a forfeiture in any case if it is to the advantage of either party to insist on a resale. Whether or not it is to the advantage of the buyer to make a resale when less than fifty per cent of the price has been paid will depend somewhat on the character of the goods which are the subject matter of the sale, and the position of the parties in the particular case. It is desirable, therefore, that no arbitrary amount be fixed for all cases, but that it be left to the parties, viewing their individual interests and position, to decide in each case whether or not there should be a forfeiture of any amount paid, no matter how small.

Though normally the seller may prefer to keep the goods, when he does not demand a resale under this section, yet he should have the right to sell if it seems advantageous for him to do so. Certainly the buyer cannot complain, for he has bound himself to pay and he is not asked to do more than he has promised.

SECTION 21. [Proceeds of Resale.] The proceeds of the resale shall be applied (1) to the payment of the expenses thereof, (2) to the payment of the expenses of retaking, keeping and storing the goods, (3) to the satisfaction of the balance due under the contract. Any sum remaining after the satisfaction of such claims shall be paid to the buyer.

This section follows out the general idea of foreclosure by sale, as against the old strict foreclosure. The conditional sale is only a form of security and no sound reason exists why the creditor should make a gain because of the default of his debtor. It is sufficient if he recovers the amount to which he is entitled so long as the enforcement of his rights does not place too great a burden upon him. Foreclosure of chattel mortgages in this State pro-

vides for the return to the debtor of any overplus on a sale of the mortgaged property.⁵²

SECTION 22. [Deficiency on Resale.] If the proceeds of the resale are not sufficient to defray the expenses thereof, and also the expenses of retaking, keeping and storing the goods and the balance due upon the purchase price, the seller may recover the deficiency from the buyer, or from anyone who has succeeded to the obligations of the buyer.

The conditional sale, like a chattel mortgage, is merely security for a debt, and until this debt is fully satisfied by realizing on the security or otherwise, the debt still remains, and if the security does not sell for enough to clear off the debt then all that the buyer should be entitled to is credit on his account for the amount actually paid over or realized by the resale of the goods. The view of security title presented in this section was clearly recognized in *In re Wise*, 121 Iowa 359, where, in the absence of provision for resale, the seller asked for and was allowed the return of the goods and the deduction of their value from the notes given for the price, and the remainder owing thereon established as a claim against the estate of the buyer.

SECTION 23. [Rights of Parties Where There is no Resale.] Where there is no resale, the seller may retain the goods as his own property without obligation to account to the buyer except as provided in Section 25, and the buyer shall be discharged of all obligation.

Since Section 20 has given to both buyer and seller the option to demand a resale, it is presumed that either party will protect himself in this manner when it is to his advantage to do so. However, when the parties so wish, they are here given the privilege of closing up the whole transaction in an entirely informal manner.

In the draftsman's notes it is stated:

"This section frees the seller from all obligations where the law is complied with and there is no resale. In such cases the equity of the buyer is probably practically worthless and it has seemed best to wipe out the transaction and clear the slate of all obligations on both sides."

⁵² Code §4277. "After notice has been served upon the parties, it must be published in the same manner and for the same length of time as is required in cases of the sale of like property on execution, and the sale shall be conducted in the same manner."

Code §4030 with reference to Execution Sales provides: "When the property sells for more than the amount required to be collected, the overplus must be paid to the debtor. . . ."

SECTION 24. [Election of Remedies.] After the retaking of possession as provided in Section 16 the buyer shall be liable for the price only after a resale and only to the extent provided in Section 22. Neither the bringing of an action by the seller for the recovery of the whole or any part of the price, nor the recovery of judgment in such action, nor the collection of a portion of the price, shall be deemed inconsistent with a later retaking of the goods as provided in Section 16. But such right of retaking shall not be exercised by the seller after he has collected the entire price, or after he has claimed a lien upon the goods, or attached them, or levied upon them as the goods of the buyer.

This section clears up a number of doubtful situations which are fruitful sources of litigation. Just as many courts have permitted an unfair, or at least a harsh, rule in regard to forfeiture, so, on the other hand, have many been equally unfair in cutting off all further rights of the seller whenever he has made use of any one remedy to protect himself. But unfairness to the buyer in one case is not counterbalanced by an unfairness to the seller in another, though this seems to have influenced many courts in working out their rules on this subject. When the rights of the buyer are properly protected, as is done under this Act, then there is no reason for refusing the seller all the means proper and reasonable to enforce his security. So long as the action of the seller does not in any way prejudice the rights of the buyer or lead him to change his position in any way, the seller ought not to be estopped from making use of all the remedies available to him to satisfy his claim, and the use of one available remedy should not be treated as an election to rely upon that remedy only.

“No result can be regarded as satisfactory which does not fully protect the seller in his right to the full price, and to his remedy against the buyer both on the debt and against the goods as security, in order to realize that price, and which does not also protect the buyer against any forfeiture or penalty beyond the amount of the price. Such protection should be afforded the buyer in spite of any attempt made in the contract to surrender or waive it.”⁵³

In passing upon the effect of retaking possession of the goods by the seller many courts have confused the retaking in cases of conditional sales, with the retaking in ordinary sales where such act amounts to a rescission. In sales, the usual situation is that the seller has no concern whatever with the goods unless, for some reason given by the law, as in the case of fraud, the seller has the right to rescind. There, in exercising his rescission he retakes the

⁵³ WILLISTON ON SALES, §579.

goods and gives up his action against the buyer for the purchase price, and the retaking does, in fact, amount to an election. The situation in conditional sales is entirely different, for the question is not one of the seller revesting himself with title and foregoing his action for the purchase price as in the case of a sale, but is purely one of enforcing the security which he has retained to secure the payment of the purchase price. This is the view taken in *In re Wise*, 121 Iowa 359. See also *Mohler v. Guest Piano Co.*, 172 N. W. (Iowa) 302.

It is said in the draftsman's notes to this section:

"It is often held that the retaking of the goods by the seller constitutes an election which prevents him from later suing for the purchase price. . . . This seems correct, only if the act of retaking necessarily amounts to a rescission of the contract. This is not true because it is perfectly possible that the seller has resumed possession merely for the purpose of realizing on his security. On the other hand, the buyer ought not thereafter to be liable for the price, unless the security which he has given for the payment of the price, the goods themselves, proves insufficient to compensate the seller. In Section 22 the seller is allowed to recover the deficiency after a resale. If he retakes the property, he is deemed to have elected to look to the goods as his primary security. If that should fail, he may have the secondary remedy of recovering the deficiency from the buyer."

Many courts, Iowa among them, have taken the view that any action for the recovery of the sum due, waives any other rights which the seller might have. *Richards v. Schreiber*, 98 Iowa 422. But the mere taking of further security, as a mortgage on the goods so sold, has been held not to operate as an election so as to constitute such waiver. *First National Bank of Corning v. Reid*, 122 Iowa 280. This section would therefore change the rule as expressed in the case of *Richards v. Schreiber*, *supra*. The opposite view, however, seems much preferable, for, as stated in the draftsman's notes,

"If an action for the price bars a later retaking of the goods, the seller will never dare to sue for the price and run the risk of getting a worthless judgment and losing his claim upon the goods. Just as an action for the chattel mortgage debt does not bar the foreclosure of the chattel mortgage at a later time, so an action for the purchase price under a conditional sale should not bar a later reliance on the reservation of the property in the goods as security."

But conduct on the part of the seller clearly inconsistent with a reliance upon his security, such as is mentioned in the latter part of this section, has been held in a recent Iowa case, *Newcomer v. Novak*, 175 N. W. 37, to amount to a waiver of the seller's rights

under the conditional sale, and the court sustained the contention that

“where the seller of property brings suit upon a note evidencing the purchase price of the property, or a part thereof, and obtains judgment thereon, and levies an execution upon the property as the property of the buyer, it is an election on the part of the seller to treat the sale of the property as absolute.”

SECTION 25. [Recovery of Part Payments.] If the seller fails to comply with the provisions of Sections 18, 19, 20, 21 and 23 after retaking the goods, the buyer may recover from the seller his actual damages, if any, and in no event less than one-fourth of the sum of all payments which have been made under the contract, with interest.

This is an effective way to bring about the enforcement of the previous provisions concerning resale. The object of the section is set forth in the draftsman's notes:

“Some penalty is necessary in order to insure that the resale will take place. This penalty seems fair. If the seller keeps the goods and neglects the resale provision, it probably means that the goods are not worn or damaged to any great extent and that their value is practically the same as when the conditional sale was made. It would be unjust to allow the seller to keep these undamaged goods and also retain the part payments of the buyer. The buyer's equity should be protected either by a resale or by a return of his part payments.”

SECTION 26. [Waiver of Statutory Protection.] No act or agreement of the buyer before or at the time of the making of the contract, nor any agreement or statement by the buyer in such contract, shall constitute a valid waiver of the provisions of Sections 18, 19, 20, 21 and 25.

This section prevents the parties from nullifying the effect of the Act by contract. Many courts, though they may have disliked to do so, have felt bound to enforce many harsh provisions merely because the parties have so contracted, and would welcome a provision which made it impossible for one party to hold the other to an unequal or unfair bargain.

The draftsman says of this section:

“In the absence of such a provision unscrupulous sellers would do away with the effect of the statute by waivers printed in small type in the contract. No act should constitute a waiver unless performed after the contract of conditional sale is complete.”

SECTION 27. [Loss and Increase.] After the delivery of the goods to the buyer and prior to the retaking of them by the seller, the risk of injury and loss shall rest upon the buyer. The increase

of the goods shall be subject to the same conditions as the original goods.

This section emphasizes the fact that the conditional sale is merely a form of security. Some courts have been confused in treating of the risk of loss by the broad generalization that "risk attends title", a proposition true generally in case of out and out sales but of no application where security title is the question at issue.

A similar section of the Uniform Sales Act⁵⁴ provides for risk of loss in case of security title and though it does not refer specifically to conditional sales, yet covers them in general terms. It is provided that:

"Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery."

With reference to risk of loss after the goods are retaken by the seller, this also should follow the ideas of security. If the retaking is only for the enforcement of the security, the risk of loss should not change, for the seller is merely enforcing certain rights with reference to the buyer's goods. Only when the acts of the seller amount to a revesting of himself with all the property rights in the goods should the risk of loss be cast upon him, unless, of course, injury or loss results through his own negligence.

SECTION 28. [Act Prospective Only.] This act shall not apply to conditional sales made prior to the time when it takes effect.

A similar provision is contained in the Uniform Sales Act.⁵⁵

SECTION 29. [Rules for Cases not Provided for.] In any case not provided for in this act the rules of law and equity, including the law merchant, and in particular those relating to principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall continue to apply to conditional sales.

An exactly similar provision is contained in the Uniform Sales Act.⁵⁶ It is impossible in such an act to cover all situations and this section makes clear the manner in which cases are to be treated which are not covered specially by the Act.

⁵⁴ 38 G. A., Ch. 396, §22(a).

⁵⁵ 38 G. A., Ch. 396, §76a.

⁵⁶ 38 G. A., Ch. 396, §73.

SECTION 30. [Uniformity of Interpretation.] This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

SECTION 31. [Short Title.] This act may be cited as the Uniform Conditional Sales Act.

SECTION 32. [Inconsistent Laws Repealed.] Except so far as they are applicable to conditional sales made prior to the time when this act takes effect, the following acts shall be and hereby are repealed. [Here repeal all existing acts in the field of conditional sales.]

SECTION 33. [Time of Taking Effect.] This act shall take effect

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SELF-CRIMINATING AND SELF-DISGRACING TESTIMONY CODE REVISION BILL

Below is set out one of the bills which the Iowa Code Commission intends to have introduced in the General Assembly for the revision of the Code.¹ Section 1 of the bill, including its descriptive heading, "Criminating Questions," is the opening sentence of 1897 Code §4612; Compiled Code §7319. The proposal to make this sentence a separate section is commendable since the rule it announces is applicable in all judicial, legislative, and administrative investigations, saving those which the following section specifically

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A BILL FOR

An act to amend, revise and codify sections twenty-eight (28), fifty-three hundred seventy-five (5375), sixty-two hundred thirty-eight (6238), and seventy-three hundred nineteen (7319) of the compiled code of Iowa, relating to the examination of witnesses.

Be It Enacted by the General Assembly of the State of Iowa:

That sections fifty-three hundred seventy-five (5375), sixty-two hundred thirty-eight (6238), and seventy-three hundred nineteen (7319) of the compiled code of Iowa are amended, revised and codified to read as follows:

Section 1. CRIMINATING QUESTIONS.

When the matter sought to be elicited would tend to render a witness criminally liable, or to expose him to public ignominy, he is not compelled to answer, except as otherwise provided. (C. C. 7319.)

Section 2. EXCEPTIONS.

In the following cases, no witness shall be excused from giving testimony, or from producing any evidence, upon the ground that his testimony or such evidence would tend to render him criminally liable or expose him to public ignominy:

1. In prosecutions against gaming, betting, lotteries, and dealing in options.
2. In prosecutions for creating, entering into or becoming a member of, or a party to any pool, trust, agreement, contract, combination, confederation or understanding with any other corporation, partnership, association or individual to regulate or fix the price of any article of merchandise or commodity or to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this state.
3. In prosecutions for keeping gambling houses.
4. In prosecutions or proceedings for violations of the statutes relating to intoxicating liquors, including proceedings wherein a peace officer is examined as to his knowledge of violations of such statutes. (C. C. 934, 999, 7319, modified.)
5. In prosecutions for the violation of the statutes relating to elections. (C. C. 541, modified.)
6. In prosecutions for making, soliciting, or receiving contributions for

enumerates. Perhaps the heading would be more accurately descriptive if it read, "Self-Criminating Testimony," since it is the testimony not the questions that may tend to incriminate. It applies to an ordinary witness and to either party in civil proceedings, who are compellable to take the stand; and assumes that the question may rightfully be put, but need not be answered if "the matter sought to be elicited would tend to render [the] witness criminally liable, or expose him to public ignominy."

In Section 2 of the bill are enumerated the excepted prosecutions, actions and investigations in which the rule is declared inoperative, that is, the exceptional proceedings in which a witness is not to have the privilege to decline to answer even though his answer may be self-criminating or self-disgracing.

Section 3 of the bill provides the usual compensation or off-set where self-criminating answers are compelled, namely, exemption from criminal prosecution for offenses thus disclosed.

The Commission has painstakingly picked out widely scattered sections, and passages tacked on to provisions for particular proceedings and put together in Section 2 as they should be, these

political purposes by or to any political committee, party, or candidate or representative thereof. (C. C. 5375.)

7. In actions wherein an election is contested and the matter sought to be elicited relates to the qualification of the witness as a voter, or consists of a statement by the witness as to the candidate for whom the witness voted when the witness was not a qualified voter. (C. C. 591.)

8. In actions for damages for violation of the laws regulating common carriers. (C. C. 5186.)

9. In prosecutions for violations of the statutes relating to the free transportation of persons by common carriers of passengers. (C. C. 5222.)

10. In investigations by the board of railroad commissioners into the manner and method pursued by common carriers, subject to their jurisdiction, in conducting their business. (C. C. 5188.)

11. In examinations or investigations conducted by any committee of the general assembly. (C. C. 1853.)

12. In prosecutions against public officers for unlawfully opening, or divulging the contents of, sealed bids. (C. C. 683.)

13. In proceedings auxiliary to executions. (C. C. 7759.)

14. In examinations by the board of control or by a committee thereof of the affairs of any institution under the control of said board. (C. C. 1903.)

15. In any action or investigation in relation to any public work or public contract. (C. C. 6237, modified.)

Section 3. IMMUNITY FROM PROSECUTION.

No person compelled under the preceding section to testify or produce evidence tending to incriminate him or to expose him to public ignominy shall be prosecuted for any crime which such testimony or evidence tends to prove or to

instances where such answers may be compelled. Since there is no rule against *asking questions*² though the answers would tend to incriminate, persons conducting judicial or other investigations may disregard or even be in ignorance whether the proceeding is one in which the privilege may be claimed, until a witness declines to answer on this ground, then opening the Code at the new section (containing Section 2 of the bill) it may quickly be seen whether the proceeding is enumerated among those in which such an answer may be compelled. No intelligent man charges his memory with such a list of miscellanies. The proposed revision promotes convenience. It saves time. It effects economy of space. It illustrates the value of good compiling. As to substance, the bill presents with a few designated and slight alterations the statutory law as it now is.

It is intended in this article to re-state briefly the purpose, scope and present day importance of this privilege against giving self-criminating testimony; its status in Iowa; to cite the Iowa decisions that deal with the privilege, with comment upon some; the necessity and desirability of the immunity from prosecution where answers are compelled, and finally to discuss the statutory privilege against compelling answers that expose to public ignominy, which by our statute is coupled up with the privilege against self-criminating testimony though almost universally these two privileges are treated as very distinct, the privilege against giving self-disgracing answers being usually much narrower in scope, very confined in its application, almost fallen into desuetude and probably not supported by sound policy.

At the outset attention should be called to the fact that when the

which the same relates. This section shall not exempt any person from prosecution for perjury. (C. C. 541, 591, 683, 934, 999, 1853, 1903, 5186, 5188, 5222, 5375, 6238, 7319, 7759, modified.)

That section twenty-eight (28) of the compiled code of Iowa is amended, revised and codified to read as follows:

Section 4. WITNESSES—ATTENDANCE COMPULSORY.

Whenever a committee of either house, or a joint committee of both, is charged with an investigation requiring the personal attendance of witnesses, any person may be compelled to appear before such committee as a witness, by serving an order upon him, which service shall be made in the manner required in case of a subpoena in a civil action in the district court, such order stating the time and place he is required to appear, signed by the presiding officer of the house appointing the committee, and attested by its acting secretary or clerk; or, in case of a joint committee, signed and attested by such officers of either house. (C. C. 28, modified.)

² See *State v. Lewis*, (1895) 96 Iowa 286, 290; WIGMORE, EVIDENCE, §2268.

privilege against giving self-criminating testimony is spoken of it usually includes the privilege of an accused, in a criminal proceeding, to elect not to take the stand at all, as well as the privilege of a witness who is compellable to take the stand as to whom, as just stated, the privilege is to decline to answer a specific question when put. The accused puts himself in the latter class when he voluntarily takes the stand; if he testifies at all he thereby waives the privilege as to all matters relevant to the charge against him but still retains the privilege of the ordinary witness when asked questions on matters irrelevant to the charge, of which questions to test credibility are the chief examples.

To the extent that his privilege may be asserted by declining to take the stand at all, this is covered by another provision of the Code (1897 Code §5484, Compiled Code §9464), which provides: "Defendants in all criminal proceedings shall be competent witnesses in their own behalf, *but cannot be called as witnesses by the state.* . . ."

Provisions found in *constitutions* though taken literally they may cover in terms only the privilege of an ordinary witness, or cover in terms only the privilege of an accused, have been broadly construed as including both, on the ground that they are intended as declaratory of the whole general principle as found in the common law, with the additional purpose of putting it beyond the reach of the legislature.

Thus to illustrate briefly by a single example,³ the whole doctrine has been regarded as incorporated into the Constitution of the United States, so far as federal proceedings are concerned, by the words of the Fifth Amendment, which are merely, "nor shall [any person] be compelled in any criminal case to be a witness against himself."

In this State while the two aspects of the privilege are separately recognized by *statute*, these statutory provisions need frequently to be read together.

ORIGIN OF THE PRIVILEGE

The privilege against self-crimination is not one of the ancient liberties of our English ancestors and is not found in Magna Charta (1215) nor in any of the other charters of English liberty, the Petition of Right (1629) nor the Bill of Rights (1689). "The English Courts and Parliaments . . . have dealt with the

³ The varieties of phrasings in State constitutions are collected in WIGMORE, EVIDENCE, §2252 and notes.

exemption as they would have dealt with any other rule of evidence."⁴

It came into English law as a rule of evidence, created and developed by judicial decision, that is, like other rules of the common law it is judge-made. Its first recognition came more than four hundred years after Magna Charta, when it was born out of the popular agitation over the prosecution of "Freeborn John" Lilburn in the Star Chamber, (1637-1641).

"In 1641, with a rush, the Courts of Star Chamber and of High Commission are abolished. . . . With all this stir and emotion, a decided effect is produced and is immediately communicated, naturally enough, to the common-law Courts. . . . Lilburn had never claimed the right to refuse absolutely to answer a criminating question. . . . [He only claimed a right not to answer if proceeded against without a proper presentment or accusation.] But now this once vital distinction comes to be ignored. It begins to be claimed, flatly, that no man is bound to incriminate himself, on any charge (no matter how properly instituted), or in any Court (not merely in the ecclesiastical or Star Chamber tribunals). Then this claim comes to be conceded by the judges,—first in criminal trials, and even on occasions of great partisan excitement; and afterwards, in the Protector's time, in civil cases, though not without ambiguity and hesitation. By the end of Charles II's reign, under the Restoration, there is no longer any doubt, in any court; and by this period, the extension of the privilege to include an ordinary witness, and not merely the party charged, is for the first time made. It is interesting to note, in passing, that the privilege thus established, comes into full recognition under the judges of the restored Stuarts, and not under the parliamentary reformers."⁵

The United States Supreme Court has said:—

"For nothing is more certain, in point of historical fact, than that the practice of compulsory self-incrimination in the courts and elsewhere existed for four hundred years after the granting of Magna Charta, continued throughout the reign of Charles I (though then beginning to be seriously questioned), gained at least some foothold among the early colonists of this country, and was not entirely omitted at trials in England until the eighteenth century."⁶

In America the framers of some of the first State constitutions⁷ chose this common law privilege as one of the principles of civil liberty to be safe-guarded against destruction by ordinary legislation, for this purpose incorporating it in their "bills of rights", and by the Fifth Amendment it was imposed as a restriction upon

⁴ *Twining v. New Jersey*, (1908) 211 U. S. 78, 108.

⁵ WIGMORE, EVIDENCE, §2250, p. 3088.

⁶ Moody, J., delivering opinion of the court, *Twining v. New Jersey*, (1908) 211 U. S. 78, 102.

⁷ *Twining v. New Jersey*, by Harlan J., 211 U. S. pp. 119, 120.

the machinery of the national government, though as the result of no wide demand.⁸ It did not appear in the New York Constitution until 1821. To this day there is no *express* provision incorporating it into the constitutions of New Jersey or Iowa.

Does it rest upon common law and statute only, in Iowa? It is clearly settled that the Constitution of the United States does not require the people of Iowa to observe this privilege in State proceedings. The privilege as found in the Fifth Amendment applies only to proceedings of the national government.⁹ The Supreme Court of the United States has also held that the due process of law clause of the Fourteenth Amendment does not require the States to grant or respect the privilege in State proceedings,¹⁰ and it was said in the case just cited,¹¹ "Exemption from compulsory self-incrimination in the courts of the States is not secured by any part of the Federal Constitution."

*State v. Height*¹² may be relied upon for the statement in the opinion that this privilege against self-incrimination is "impliedly guaranteed under the provision of our [State] constitution as to due process of law." The Supreme Court of the United States has held upon the most convincing reasoning that the same words in the Fourteenth Amendment do not contain that inference. It is true, of course, that if the State Supreme Court has *held* in *State v. Height* that the due process clause of the State constitution is more comprehensive than the limitation laid upon the State by the due process clause of the Fourteenth Amendment that would be decisive of the State constitutional law in Iowa, at least temporarily, that is until the State court overrules that decision, —no matter how erroneous is the reasoning in that case. But the statement though reasoned, or shall we say mis-reasoned at length, was not responsive to any issue in the case and was dictum only. If the ruling of the trial court was a violation of the privilege against self-crimination as the Supreme Court said, then it was a violation of the privilege as secured by the State statute, and it was entirely unnecessary to inquire whether the privilege would have existed without the statute as an implication from the constitution. Even without the statute the privilege would have existed by virtue of the common law. Not until the legislature undertakes

⁸ Moody, J., *ibid.*, pp. 108–110.

⁹ *Ensign v. Pennsylvania*, (1913) 227 U. S. 592.

¹⁰ *Twining v. New Jersey*, *supra*.

¹¹ At p. 114.

¹² (1902) 117 Iowa 650, esp. pp. 654–661.

to abolish the privilege entirely or materially to curtail it can the question arise. On the contrary the legislature had confirmed the privilege with all its scope as at common law, and the statutes doing so were then and still are in force.

The error of the dictum appears very clearly historically. It is to Magna Charta (1215) that we go back to find the original of our due process of law limitation, a limitation enforced by English courts for four hundred years during which they compelled self-incriminatory evidence. When they eventually declared exemption from the latter, they did so not as a new interpretation of due process of law, but independently of it. The framers of the first constitutions in America when they inserted a clause against self-incrimination did so in addition to a due process clause. It is clear that the former was not regarded as included in the latter. It would be strange that the makers of the Iowa constitution in making use of such well-known words as due process of law should have used them in a sense other than that in which they were elsewhere universally used. Should the Supreme Court of Iowa ever be asked to adopt the doctrine of this dictum they will be confronted with the subsequent and powerful reasoning of the United States Supreme Court in *Twining v. New Jersey*. It seems, moreover, that the State Supreme Court has just recently repudiated the former dictum, by a countervailing one.¹³

Yet so long as the privilege exists in Iowa by statute or by common law it will have the same meaning and scope as it has in other States under the sanctions of their constitutions. The phrasings in these various constitutions have differed sometimes markedly if taken literally but they are all construed as having one meaning, viz., as declaratory of the privilege as it existed at common law.

The New Jersey court has said: "Although we have not deemed it necessary to insert in our constitution this prohibitive provision, the common law doctrine, unaltered by legislation or by lax practice, is by us deemed to have its full force."¹⁴

¹³ In *Davison v. Guthrie*, (1919) 172 N. W. 292, the court states in effect that even if 1897 Code §4075 commands the witness to answer every question (and even though §4612 should not be read into §4075 as excepting incriminating questions) and even though immunity is not given against prosecution under §5042, yet §4075 violates no provision of the Constitution of this State. The present writer agrees with that conclusion. But the court really says this only *arguendo* because in the upshot it concludes that the trial judge correctly ruled that responsive answers to the questions would not tend in any way to incriminate the witness.

¹⁴ *State v. Zdanowicz*, (1903) 69 N. J. L. 619, 622; 55 Atl. 743, 744.

SUMMARY STATEMENT OF SCOPE

"The protection extends to *all manner of proceedings* in which testimony is to be taken, whether litigious or not, and whether *ex parte* or otherwise; it therefore applies in all kinds of courts, in all methods of interrogation before a court, in investigations by a grand jury, and in investigations by a legislature or a body having legislative functions."¹⁵

"The facts protected from disclosure are distinctly facts involving a criminal liability or its equivalent. Hence, facts involving a civil liability are entirely without the scope of the privilege."¹⁶

Ex abundantia, however, the code of Iowa expressly covers the latter point.¹⁷

"The privilege against disclosing facts involving disgrace or infamy (*i. e.*, irrespective of criminality) began to be recognized later than the privilege against self-crimination and independently of it. Its limitations were entirely distinct, in that it did not cover facts merely 'tending' to disclose infamy, and did not apply to facts material to the issues (but only to "collateral" facts, *i. e.*, practically, to facts solely affecting credibility)."¹⁸

It is apparent that the Iowa statute has enlarged this latter privilege beyond its common law scope. This will be dealt with later.

The Supreme Court of the United States has also said that the privilege of the witness by common law as sanctioned by constitutions does not extend "to facts which may impair his reputation for probity or even disgrace him; but the line is drawn at testimony that may expose him to prosecution."¹⁹

If prosecution has become barred by law the privilege not to disclose can no longer be claimed. It ceases to operate because criminal liability being gone the witness exposes himself to none by testifying. Prosecution may become legally barred by lapse of the period of limitation²⁰ for prosecution, by prior conviction, or prior acquittal or other former jeopardy, or by pardon, or by statutory grant of immunity.

Here we find the motive for the immunity from prosecution granted by the provisions of the code, consolidated into Section 3 of the proposed bill, to off-set the compulsion to answer in the enumerated proceedings of Section 2. While it seems to be true in

¹⁵ WIGMORE, EVIDENCE, §2253, p. 3105.

¹⁶ *Ibid.*, §2254, p. 3105.

¹⁷ 1897 Code §4611, Compiled Code §7318.

¹⁸ WIGMORE, EVIDENCE, §2255, p. 3106.

¹⁹ *Hale v. Henkel*, (1906) 201 U. S. 43, 66.

²⁰ *Mahankie v. Cleland*, (1888) 76 Iowa 401, 404.

Iowa that the legislature may curtail or abolish the privilege, since it is not restrained by any constitutional provision, and it may, therefore, withdraw the privilege in any proceeding without granting immunity to the witness compelled thereby to criminate himself, the same policy which operates elsewhere to procure a constitutional sanction for the privilege has rightly with us had its proper weight with the legislature. In those States where the legislature is restrained by State constitutional provision, the legislature is *compelled* to grant immunity from prosecution in order to compel an answer. With us, it is deemed sound policy to do so, yet the time may come when it will be found good policy in specific instances to compel answers without offsetting this compulsion with a grant of immunity. A constitutional amendment will be necessary in those States, though not in Iowa.

In Pennsylvania it has been considered wise to make special exception in the constitution as to "lawful investigations or judicial proceeding against any person who may be charged with having committed the offence of bribery or corrupt solicitation." In such proceedings, it is provided, witnesses are compellable to give incriminating testimony, without immunity from prosecution for offenses disclosed thereby, but only an immunity from having the compulsory testimony actually given by them used to obtain their conviction.²¹

Where the privilege is safeguarded by constitutional provision against abridgement by the legislature it is held that in order to off-set the privilege by grant of immunity, the immunity must be fully co-extensive with the privilege.²²

A very interesting problem has arisen in those jurisdictions, *viz.*, whether the witness may decline on the ground that while his answer would not expose him to criminal liability under the laws

²¹ *Commonwealth v. Cameron*, (1911) 229 Pa. 592, 597; 79 Atl. 169, 171. The court said: "That exemption from compulsory self-crimination is a natural right secured by the federal constitution, which a state constitution can neither take away or abridge [is a] position which is not sustained by principle or authority." The necessity for making this curtailment by constitutional provision was due to having another provision in the Constitution which recognized the privilege in the usual broad and general terms, with which the court thought the immunity not co-extensive, and not sufficient if it had been given by statute merely.

²² *Counselman v. Hitchcock*, (1892) 142 U. S. 547, (this case has never been doubted on the proposition in the text, but much criticised on its holding that the immunity statute before the court was not co-extensive with the privilege. See criticism in WIGMORE, EVIDENCE, §2282.).

of the jurisdiction in whose tribunal he is then testifying it would expose him to such liability under the laws of some other jurisdiction. In *Hale v. Henkel*²³ in holding the immunity given by a federal statute to witnesses in certain federal proceedings to be co-extensive with the privilege granted by the United States Constitution, the court said:

“The further suggestion that the statute offers no immunity from prosecution in the state courts was also fully considered in *Brown v. Walker*, and held to be no answer. The converse of this was also decided in *Jack v. Kansas*, 199 U. S. 372,—namely, that the fact that an immunity granted to a witness under a state statute would not prevent a prosecution of such witness for a violation of a federal statute did not invalidate such statute under the fourteenth amendment. It was held both by this court and by the Supreme Court of Kansas that the possibility that information given by the witness might be used under the federal act did not operate as a reason for permitting the witness to refuse to answer, and that a danger so unsubstantial and remote did not impair the legal immunity. Indeed, if the argument were a sound one it might be carried still further and held to apply not only to state prosecution under the criminal laws of other states to which the witness might have subjected himself. The question has been fully considered in England, and the conclusion reached by the courts of that country that the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty. *Queen v. Boyes*, 1 Best & S. 311; *King of the Two Sicilies v. Willcox*, 7 St. Tr. (N. S.) 1049, 1068; *State v. March*, 46 N. C. (1 Jones L.) 526; *State v. Thomas*, 98 N. C. 599, 4 S. E. 518, 2 Am. St. Rep. 351. The entire question of immunity is also exhaustively treated in Wigmore on Evidence, §§2255-2259.”

Time will not be taken to determine whether *Brown v. Walker*²⁴ and *State v. Jack*²⁵ go so far as the court here states for in this inquiry into Iowa law the ultimate solution of these knotty problems is immaterial, since in Iowa, a witness must submit to having his statutory privilege taken away or curtailed upon such terms as the legislature sees fit to concede. It may be remarked, however, that it seems inevitable that courts will be driven to adopt the above propositions, whether they regard them as logically sound or not, for unless the “immunity bath” does not work to remove the witness’s privilege society will find it practically impossible to enforce many of its necessary laws, without curtailment of the privilege by constitutional amendments. The State of New York, for example, cannot grant to a person immunity from prosecution for crimes committed against the laws of France, of the federal gov-

²³ (1906) 201 U. S. 43, 68, 69.

²⁴ (1896) 161 U. S. 591.

²⁵ (1904) 69 Kansas 387, 76 Pac. 911.

ernment of the United States, or against the laws of Iowa. If the self-crimination clause of the constitution of New York permits the witness not to answer solely because he will thereby expose himself to prosecution under those "foreign" laws, no New York statutory immunity can be made co-extensive with the privilege. A distinction might be drawn on the ground that since the witness may never get within the jurisdictions of France or Iowa the danger of prosecution there is "unsubstantial and remote" but not so as to the federal law since the federal government is in New York ready to apprehend the witness.

As stated above these problems of co-extensiveness of immunity are academic in Iowa, since we need not inquire whether the immunity given in Code Commissioner's Bill, Section 3, is as broad as would be our constitutional provision, if our constitution had one. It may be said, to avoid misunderstanding, that Section 3 gives as comprehensive immunity as can be found in any statute anywhere, and as broad as the State can make it.

It should not be concluded, however, that there is nothing germane to Iowa problems in the points just brought out. They have just the reverse applicability with us that they have elsewhere. Though they need not be considered in Iowa to determine whether the immunity given in Section 3 of the Bill is adequate they whirl about to define the scope of the privilege given by Section 1. Nothing is plainer than that the legislature in adopting these statutes has (and they are substantially the existing law) regarded the immunity from prosecution as fully co-extensive with the privilege which also it has granted, therefore, since the immunity from prosecution does not, because it cannot, extend to prosecutions in other jurisdictions, it is obvious that the privilege of a witness given in Section 1, does not extend to silence with reference to crimes against the laws of other jurisdictions, if not also criminal violations of Iowa law. The split of judicial authority on this point under constitutions elsewhere need not trouble us.²⁶

A cautionary word may be said about the immunity given in Section 3 of the proposed bill. A person claiming immunity from prosecution must show that the former compulsory testimony given by him did expose him to real danger of prosecution. It is not enough that he is now being prosecuted for an offense to which the matter elicited from him is remotely related. Where a federal statute enacted that a witness shall not be prosecuted for any

²⁶ See WIGMORE, EVIDENCE, §2258, and Supplement (Vol. V), pp. 543, 544.

transaction or matter "concerning which he may testify", the United States Supreme Court held: "When the statute speaks of testimony concerning a matter it means concerning it in a substantial way."²⁷ So the phrase, "to which the same relates", in Section 3, should be construed.

Returning to the rules relating to the privilege where no immunity from prosecution is given by law. A witness may decline to answer only if the answer would tend to expose *himself* to criminal prosecution. He cannot plead the fact that some other person might be incriminated by his testimony. Not even though he is the agent of such other person.²⁸ Nor can he shelter a corporation of which he is an agent or officer.²⁸ This rule applies equally to orders(*e. g., subpoena duces tecum*) to produce books and papers of a corporation as it does to questions put to the witness on the stand. The agent or officer must produce them even though they will disclose facts incriminating the corporation,²⁹ or the agent or officer himself.²⁹ The latter's privilege extends to withholding only his own personal papers.

Even when the order is directed to the corporation it must respond through one of its officers or agents though the documents tend to incriminate it.³⁰ The privilege protects only natural persons. Professor Wigmore stated the opposite view at a time when there was little authority.³¹

Since the only fact the witness may decline to disclose is one which tends to incriminate, it becomes vital to inquire what is a

²⁷ *Heike v. United States*, (1913) 227 U. S. 131, 144.

²⁸ *U. S. Express Co. v. Henderson*, (1886) 69 Iowa 40; *Hale v. Henkel*, (1906) 201 U. S. 43, 70, 74.

²⁹ *Hale v. Henkel*, *supra*, where, however, the court found the *subpoena* "far too sweeping in its terms to be regarded as reasonable" under the requirement of the Fourth Amendment forbidding unreasonable search and seizure. But when the *subpoena* to produce books and papers is "suitably specific and properly limited in scope" the propositions of the text apply. *Wilson v. United States*, (1911) 221 U. S. 361, 376; *Dreier v. United States*, (1911) 221 U. S. 394 (personal incrimination of secretary and custodian of corporate books). Even when a corporation has been dissolved and the books transferred to a former officer the latter may not decline to produce them though they may incriminate him. That the books may for many purposes have become his is immaterial; it is their character as corporate books that is the test. *Wheeler v. United States*, (1913) 226 U. S. 478; *Grant v. United States*, (1913) 227 U. S. 74.

³⁰ *Wilson v. United States*, *supra*.

³¹ EVIDENCE, §2259, at p. 3116.

fact tending to incriminate? This question has been clearly answered by Wigmore:

"Most criminal acts are made up of two or more subordinate facts, each an essential part of the completed crime. . . . No one of the component facts constitutes of itself the crime, and yet every one of them must be established in order to establish the crime. It is therefore obvious that unless the privilege is to remain an empty formula easily evaded, its protection must extend to each one of these facts taken separately, as well as to the general whole. It would be immaterial whether the evasion consisted in obtaining from the witness himself all these component facts by separate inquiries, or in obtaining one such fact by inquiry of himself and the remainder by other proof; the difference would be merely in the quantity of evasion; for it would be the witness's own disclosure which still would be essential to complete the proof, and his own disclosure would thus essentially involve a criminating fact.

"Such and no more is the orthodox and traditional doctrine that the privilege covers facts which even 'tend to criminate'."³²

Wigmore adds:

"But the phrase has also been wrenched and extended in a certain class of rulings, to mean much more, namely, to cover facts which, though colorless in themselves, *by possibility may furnish a clue* in searching for other facts, and thus lead ultimately to the extra-judicial detection of the criminal fact and its subsequent infra-judicial proof by other testimony. . . . It was reserved for latter-day courts, who treated the privilege with morbid delicacy, and were disposed to expand it into misty attenuation, to resort to this meaning."

It seems that in Iowa it is settled that an answer that merely discloses a clue cannot be withheld.³³

The court need not warn a witness of the existence of the privilege, though it is not error for it to do so.³⁴

Who determines the correctness of the witness's claim that he is privileged not to answer a given question? If left to the witness to solely determine this, he may by undetectable perjury or by reason of an undisclosed ignorance of what constitutes crime de-

³² EVIDENCE, §2260, p. 3117, and §2261, pp. 3120, 3121.

³³ *Richman v. State*, (1850) 2 G. Gr. 532; *State v. Duffy*, (1863) 15 Iowa 425. Since in both cases it was ruled that the witness must answer irrespective of the answers being yes or no, it must be assumed that the answer would have been, yes. This would have furnished a clue suggesting further investigation of the witness but it would disclose no evidence essential to convict.

³⁴ *State v. Dangelo*, (1918) 182 Iowa 1253, 166 N. W. 587; WIGMORE, §2269. Distinguish from the above point the compulsory examination by a grand jury of a person then under arrest as to facts material to the charge without warning him that his answers may be used against him, (the doctrine of involuntary confessions), *State v. Clifford*, (1892) 86 Iowa 550; cf. *State v. Carroll*, (1892) 85 Iowa 1, 4; and see WIGMORE, EVIDENCE, §§842-852.

cline to give any testimony. Nor can the court determine that *the* truthful answer would not incriminate because the court is not entitled to know what *the* answer would be. The witness "is not required to explain how he would be criminated, for this would, or might, annihilate the protection. . . ." ³⁵

The reconciling compromise assigns to the court the function and only the function of deciding from the question whether a direct answer or *any one* of the several alternative direct answers *might* disclose a criminal act or an essential factor of a criminal act, and if it *might* he must respect the witness's claim to the privilege of silence, otherwise he must compel an answer. The Iowa courts have followed Chief Justice Marshall's oft-quoted formulation of this rule.³⁶ Thus in *Clifton v. Granger*,³⁷ in an action for seduction the plaintiff was asked whether she had had intercourse with any of other named men, previous to the alleged seduction. She claimed privilege against self-crimination. The Supreme Court held that there was no error in allowing the privilege, saying: "It does not appear that all of the men named in the interrogatives were unmarried men, hence, we cannot say that an affirmative answer would not have tended to criminate the witness."

Clifton v. Granger is of interest on the question who may claim the privilege. The court says:

"It is urged that the privilege is personal, and can only be claimed by the witness. Conceding such to be the rule,³⁸ we think this record shows that the claim was made by the witness. It is not required that she should in person address the court and claim the privilege. It is certainly sufficient if, through her counsel, the court was given to know that the witness did for herself claim the privilege."

³⁵ Wright, J., in *State v. Duffy*, (1863) 15 Iowa 425, 427. It may be doubted whether this aspect was given proper weight in *Mahanke v. Cleland*, (1888) 76 Iowa 401, 405-406, where it is said: "The witness will be entitled to show reasonable grounds for believing that her answer to the question . . . would tend to render her criminally liable. . . ."

³⁶ Burr's Trial, Robertson's Rep. I, 243; Fed. Case 14692 E. (recently followed in *Mason v. United States*, (1917) 244 U. S. 362); *Richman v. State*, (1850) 2 G. Gr. 532; *Prints v. Cheeney*, (1861) 11 Iowa 469; *State v. Duffy*, (1863) 15 Iowa 425 (doubting whether the preceding case correctly applied the rule); *Hunt v. McCalla*, (1865) 20 Iowa 20. But see *Mahanke v. Cleland*, questioned in the preceding note. The cases in other jurisdictions are collected in 24 L. R. A. (N. S.) 165 and 49 L. R. A. (N. S.) 826.

³⁷ (1892) 86 Iowa 573, 575.

³⁸ So held in *State v. Van Winkle*, (1890) 80 Iowa 15, 20. See WIGMORE, EVIDENCE, §2270 and cases there cited to this effect and that party's counsel may not give public warning to the witness nor require the judge to do so.

Here the witness was also a party and the words of her counsel were, "The witness claims the privilege", etc. It is plain that if counsel were permitted by such phrasing to make claim in behalf of a witness other than the party employing him, the rule, which the court concedes, would be gone, unless counsel were in a position truly to say, I am authorized by the witness to claim in her behalf, etc.

Can a *party* except to an erroneous ruling *against* witness's claim of privilege? On principle, this should not be permitted, since the privilege is personal to the witness and the question is assumed to be relevant. If not relevant, the *question* could have been objected to on that ground. If the witness had waived the privilege and voluntarily answered, it is conceded that this is no concern of the party; how then can the latter object to a denial of the privilege which exists for the protection of the witness only? So in Iowa it is held that the party cannot complain.³⁹

If a party cannot except how can the witness vindicate his claim, how protect his privilege? By appropriate resistance to or relief from the contempt proceedings in which an answer is sought to be compelled.⁴⁰

On the other hand if the court erroneously concedes the privilege a *party* may properly except since assumedly relevant evidence is excluded.⁴¹ It seems also that by a petition for a writ of *certiorari* an order may be obtained directing the trial court to compel an answer.⁴²

When the accused refrains from taking the stand, as the privilege permits, or an ordinary witness declines to answer on the ground of this privilege, unfavorable inferences naturally arise and no fiat of law can prevent their arising in the minds of judges and jurymen. It is a problem of the law to eliminate so far as possible these inferences from consideration, otherwise the privilege is of little value.

Our Code provides: §5484 (Compiled Code §9464) ". . . . should a defendant [in a criminal case] not elect to become a wit-

³⁹ *State v. Van Winkle*, (1890) 80 Iowa 15, 20; *State v. Cobby*, (1905) 128 Iowa 114, 116, 117.

⁴⁰ *Richman v. State*, (1850) 2 G. Gr. 532 (by writ of error to judgment for contempt, leave to except allowed); *State v. Duffy*, (1863) 15 Iowa 425 (by *certiorari*); *Hunt v. McCalla*, (1865) 20 Iowa 20 (*habeas corpus* to obtain release from commitment).

⁴¹ *State v. Fay*, (1876) 43 Iowa 651; and see *Prints v. Cheeney*, (1861) 11 Iowa 469; *Clifton v. Granger*, (1892) 86 Iowa 573.

⁴² *Mahanke v. Cleland*, (1888) 76 Iowa 401.

ness, that fact shall not have any weight against him on the trial. . . ."

The court of its motion may so instruct the jury,⁴³ but if not requested it need not do so.⁴⁴ On the other hand it is its duty to do so when requested by defendant's counsel.⁴⁵

§5484 continues: "Nor shall the attorney or attorneys for the state during the trial refer to the fact that the defendant did not testify in his own behalf; and should they do so, such attorney or attorneys will be guilty of a misdemeanor, and *defendant shall for that cause alone be entitled to a new trial.*"

The italicized provision has been inflexibly enforced as its terms require. It has been criticised on the ground that it operates mechanically instead of leaving the grant of a new trial to the general rules on that subject.⁴⁶

Another rule about unfavorable inferences, that of *State v. Rodman*,⁴⁷ needs careful attention to prevent its conflicting with the doctrine just stated. The rule of that case is that if evidence within the power of the defendant and not accessible to the state, which would have explained facts and circumstances established by evidence against him, is withheld by him, the jury are authorized to infer that, if produced, it would be against him.⁴⁸ This rule is in conflict with the privilege against self-crimination unless confined (1) to case where the accused has taken the stand and (2) to cases where not having taken the stand he might have offered the explanatory evidence *through other witnesses than himself*.⁴⁹ But in *State v. Hasty*⁵⁰ it is held that the state has a right to call the jury's attention to the fact that certain evidence is uncontradicted, even though the accused may be the only person who might have contradicted it, though in that case the accused had not gone on the stand.

The court at times has been more conscious of the danger of thus extending the rule of *State v. Rodman*. Thus in *State v. Snider*⁵¹ which was relied upon in *State v. Hasty*, the court had said: "We

⁴³ *State v. Weems*, (1895) 96 Iowa 426, 448, 449.

⁴⁴ *State v. Stevens*, (1885) 67 Iowa 557, 559.

⁴⁵ *State v. Carnagy*, (1898) 106 Iowa 483, 488-490.

⁴⁶ WIGMORE, EVIDENCE, §2272, §21

⁴⁷ (1883) 62 Iowa 456, 458.

⁴⁸ *Accord:—Caminetti v. United States*, (1917) 242 U. S. 470, 492-495 and cases cited in WIGMORE, EVIDENCE, §2273.

⁴⁹ See WIGMORE, §2273, pp. 3148, 3149.

⁵⁰ (1903) 121 Iowa 507, 519.

⁵¹ (1902) 119 Iowa 15, 22.

do not think that the defendant suffered any prejudice . . . especially as the court . . . gave to the jury an instruction to the effect that his failure to become a witness should have no weight against him." Though *State v. Hasty* is cited with approval in *State v. Krampe*⁵² the court deems it important to point out that there was at least one witness, other than the accused, who might have been called to contradict.

The same general rule applies against considering inferences that might be drawn from the silence of an *ordinary witness* under a claim of this privilege. Even though the inference from the declination to answer naturally may be that the criminating fact exists the minds of judge and jury are to close themselves against it.⁵³

But the above safeguards of Code §5484 do not apply in the case of the ordinary witness. The rule is not without practical effect, however, since the inference must be treated as non-existent in determining the establishment of the issue, discrediting⁵⁴ a witness, etc. If a witness claims this privilege and is erroneously ordered to answer, and does answer the evidence elicited cannot be used against him in a subsequent prosecution.⁵⁵ The fact that an accused person claimed privilege, in former litigation, against answering a question which might have connected him with the offense now charged is not admissible.⁵⁶

Next as to waiver of the privilege. As to any witness whatsoever in civil or criminal proceeding, other than the accused in a criminal prosecution, he may waive his privilege by answering, and the accused does so by voluntarily taking the stand. What is the extent of these two waivers? As to the former, according to the best writer on the subject, "the only inquiry can be whether, by answering as to fact X, he has waived it for fact Y. If the two are related facts, parts of a whole fact forming a single topic, then his waiver as to a part is a waiver as to the remaining parts;" though he does not cut himself off from asserting his privilege as to any subsequent question inquiring into another fact not thus related to

⁵² (1913) 161 Iowa 48, 54.

⁵³ *Slocum v. Knosby*, (1886) 70 Iowa 75, 78, where Beck, J., in delivering the opinion of the court to this effect himself dissented. In accord with the majority of the court, see WIGMORE, EVIDENCE, §2272, p. 3147, and cases in other jurisdictions there cited.

⁵⁴ So in *Slocum v. Knosby*, just cited.

⁵⁵ (*semble*) *State v. Bailey*, (1880) 54 Iowa 414, 416; (*semble*) *State v. Van Winkle*, (1890) 80 Iowa 15, 21.

⁵⁶ *State v. Bailey*, (1880) 54 Iowa 414, 415.

X. This is the rationale of the rule usually followed in America. The Iowa cases seem consistent with this formulation. Thus the witness having testified to a conversation in which the accused admitted the larceny charged, claimed the privilege against the further question, "Who else was present at the conversation?" The Supreme Court held⁵⁷ that the waiver extended to this further question, saying, "If he consents to testify to any matter tending to criminate himself, he must testify fully in all respects relative to that matter material to the issue." In another case it was held that the further facts asked for did not sufficiently relate to facts already testified to, to be embraced within the waiver.⁵⁸

As to the extent of the *accused's* waiver by voluntarily taking the stand Professor Wigmore states⁵⁹ that on principle it should extend to all facts relevant to the charge, since if he testifies at all he must testify to some fact relevant to that, and any other fact permissible to ask about necessarily must be related to that. On the contrary, facts merely impeaching credibility are not embraced within the waiver since they are not relevant to the charge. Some States, however, hold that the latter are embraced also. Professor Wigmore adds that "the state of the law in various jurisdictions is not easy to determine, partly because of the ambiguity of the various statutes and partly because of the differing interpretations of the same statutory words by different courts."

The rule of the Code⁶⁰ which restricts the state, on cross examination, to the matter testified to in the examination in chief should not militate against the existence of the rule as formulated above "for the subject of the direct examination, properly construed, is the whole fact of guilt or innocence, and hence the topic of cross-examination might always range over any relevant facts except those merely affecting credibility."⁶¹

That the accused's waiver by taking the stand does not extend in Iowa to cut off his asserting the privilege as may any other witness when asked for criminating facts merely to test credibility, i. e., facts not relevant to the main issue, seems to follow from the statement in the cases that the same rules for cross-examination to test credibility apply to the accused who takes the stand that gov-

⁵⁷ *State v. Fay*, (1876) 43 Iowa 651, 653.

⁵⁸ *Slocum v. Knosby*, (1886) 70 Iowa 75.

⁵⁹ EVIDENCE, §2276, p. 3153 ff.

⁶⁰ 1897 Code §5485, Compiled Code §9465.

⁶¹ WIGMORE, EVIDENCE, p. 3155; *Powers v. United States*, (1912) 223 U. S. 303, 315, 316.

ern in the case of other witnesses,⁶² though on the specific point in hand the court seems not to have spoken except by dictum.⁶³

Though it is not the law in some other jurisdictions it is held in Iowa that the testimony of an accused at his former trial is admissible against him on a new trial.⁶⁴ This does not mean that his waiver at the first trial cuts off his privilege to refrain from taking the stand in the second trial; it does, however, permit evidence given by him under oath to be used against him without consent given in the trial at which it is used. Perhaps, though, no sound policy behind the privilege is violated.

PART II

SELF-DISGRACING ANSWERS

Code Commission Bill, Section 1. "When the matter sought to be elicited would tend to render a witness criminally liable, or to

⁶² *State v. Brandenberger*, (1911) 151 Iowa 197, 204, and cases there cited.

⁶³ In *State v. O'Brien*, (1890) 81 Iowa 93, 96, it is said: "We think the rules permitting a witness to be examined on cross-examination to show convictions for crimes committed by him in order to impeach him, [1897 Code §4613, Compiled Code §7320] applies [sic] to persons charged with crimes when they appear themselves as witnesses. . . . *Of course they may, as other witnesses, decline to answer questions, if their evidence would tend to criminate themselves.*" Presumably the italicized remark applies to criminalizing facts relevant to credibility merely and not to facts relevant to the charge, since the waiver extends at least to the latter.

In *State v. Peffers*, (1890) 80 Iowa 580, 583, the wife of the defendant, who was being tried on a charge of murder, had herself been arrested previously on a charge of the same crime, and had voluntarily testified before a coroner's jury. Now at the trial of her husband she was called as a witness for the defense and on cross-examination was asked if she had not testified as to certain matters before the coroner's jury. "The question was objected to by the defendant." The Supreme Court said: "The question . . . was asked to lay the foundation for impeaching her. We think the question was a proper one, and that the matter sought to be proven was not privileged." It is not clear what the case stands for more than this, that the very evidence given at a former hearing under a waiver of the privilege is itself admissible to impeach. The case does not seem to hold that a waiver as to one fact may extend to other facts asked about for purpose of impeachment. *State v. Van Winkle*, (1890) 80 Iowa 15, 20, seems to be to the same effect, that one who had answered before the grand jury, there waiving his privilege, cannot claim privilege at a subsequent trial, when called as an ordinary witness, against answering as to matters covered in his previous testimony. Distinguish *State v. Clifford*, (1892) 86 Iowa 550 ("Involuntary" confession of the accused before the grand jury, inadmissible at his trial).

⁶⁴ *State v. Kimes*, (1911) 152 Iowa 240; compare *State v. Peffers* and *State v. Van Winkle*, in the preceding note.

expose him to public ignominy, he is not compelled to answer, except as otherwise provided."⁶⁵

The Supreme Court has said:

"This term 'ignominy' means shame, disgrace, dishonor. . . . 'Public ignominy', therefore, means public disgrace, public dishonor."⁶⁶

"[Ignominy] was not intended to apply to all acts which might justify public censure or disapproval, but those of a more serious nature, which would tend to expose the perpetrator to public hatred or detestation or dishonor. . . . Under our statute, no rule applicable to all cases is possible, but the privilege of the witness must depend largely upon the facts of the transaction which are sought to be shown."⁶⁷

The privilege to decline to give self-criminating answers or the privilege given by our statute to refuse to give self-disgracing answers, like all other privileges not to give testimony, are exceptions to the necessary and fundamental duty of every citizen to aid in the administration of the law, which ranges with the duty to vote or to bear arms,—that order, right and justice may prevail. This is true whether the testimony is for society against one rightly accused of crime, or to establish the innocence of one erroneously accused, or to do justice between a plaintiff and defendant in a civil action. Justice not founded upon truth is apt not to be justice. To the extent that truth may be concealed, withheld from the courts, error may occur resulting in injustice and contempt for justice by law. Every exception to the duty to testify must be justified upon sound and substantial policies.

As is well known even the privilege against self-crimination has been questioned and regarded as of doubtful policy. That it presents a substantial obstacle to the administration of justice in Iowa is well shown by the long list of excepted proceedings collected in Section 2 of the Bill under comment. The price we pay to overcome that obstacle is the grant of immunity to many offenders. The Supreme Court of the United States has thus expressed itself:

"The wisdom of the exemption has never been universally assented to since the days of Bentham; many doubt it today, and it is best defended not as an unchangeable principle of universal justice but as a law proved by experience to be expedient. See Wigmore, §2251. It has no place in the jurisprudence of civilized and free countries outside the domain of the common law, and it

⁶⁵ This is the present law, 1913 Code Supp. §4612, and dates back to 1851 Code §2397.

⁶⁶ *Brown v. Kingsley*, (1874) 38 Iowa 220, 221, 222.

⁶⁷ *Mahanke v. Cleland*, (1888) 76 Iowa 401, 405.

is nowhere observed among our own people in the search for truth outside the administration of the law.''⁶⁸

Professor Wigmore considers the privilege in three aspects: (1) as permitted to the ordinary witness, (2) to a person being preliminarily examined with a view to charging him, (3) to the accused, on trial, and finds different grounds of expedience for the retention of the privilege in the three cases. It is not necessary here to state them with reference to the last two (where the privilege takes the form of excusing from testifying at all); it is sufficient to say that the grounds seem stronger in those two cases. The concern here is with the ordinary witness (which includes even the accused when he voluntarily takes the stand). In this case Wigmore⁶⁹ finds only this reason, *viz.*, the existence of the privilege tends to overcome the reluctance to appear as witnesses and the consequent evasion of the duty, or the concealment of knowledge lest one be called as a witness. He adds that the privilege (against self-crimination) does not in this case work any insuperable obstacle to the ascertainment of the truth, since where the witness's testimony is indispensable or vital to the cause the privilege may be overcome by grant of immunity.

This is to say that the privilege is defensible because where it is an obstacle it may be gotten round, at some cost, it is true. This reasoning obviously does not apply to sustain a privilege not to give a self-disgracing answer for that privilege cannot be gotten round in any case. It must be recalled that the question if relevant may be asked. No immunity can be devised to shield the witness from the disgracing consequence of his answer. Fortunately no constitution requires recognition of a privilege against self-disgracing answers, neither in Iowa nor elsewhere.⁷⁰ An immunity statute or pardon may say the witness shall not be prosecuted for an offense disclosed by an incriminating answer, but no law can stop the auditors or the public from drawing conclusions from the disgracing answer. The immunity statutes are drawn on the assumption that if the answer is both incriminating and disgracing it is sufficient to shield the witness from the incrimination only.

In the long list of proceedings collected in Section 2 of the Code Commission Bill⁷¹ self-disgracing answers must be given. The im-

⁶⁸ Moody, J., delivering the opinion of the court in *Twining v. New Jersey*, (1908) 211 U. S. 78, 113.

⁶⁹ EVIDENCE, §2251, p. 3095.

⁷⁰ See *ante*, p. 177.

⁷¹ *Ante*, pp. 175, 176.

munity clause (Section 3)⁷² attempts no grant of immunity from the consequences of such answers, since none is possible.

No sufficient reason exists to allow a witness to decline to answer a *material* question solely on the ground that the answer will disclose that he has committed a disgraceful act. Social interests outweigh the individual interest here. Yet that is what the Iowa Code permits, outside of the proceedings enumerated in Section 2 of the Code Commission bill; and some of the proceedings vital to maintenance of social order are not contained in the list. Murder trials, for instance, to take an extreme case. Suppose A is being tried on a charge of murder, the shooting of B in a house of prostitution, death ensuing immediately. W, as a witness, may be asked, Were you present at B's death? If a truthful answer would not tend to incriminate, the Code, 1897, §4612, reproduced in Section 1 of the bill, says that W may decline to answer on the sole ground that his answer would expose him to public ignominy. Regardless of what W's social standing may be, should he be excused from answering? Is he entitled to retain his false social standing as against the demands of justice?

Besides it is clear that the privilege to decline to answer is futilely given him. Recall that the *question* may rightfully be put. What does he gain by silence? Perhaps worse than nothing. The public draws its inferences. Why then permit him uselessly to conceal vital truth? Note that the argument is that he should not be allowed to set up the self-disgracing privilege against answering *material* questions.

In England it is true that the courts go too far in disgracing witnesses. There it is permitted in cross-examination of a witness for the purpose of testing credibility to probe into specific acts of immoral conduct and the witness must answer regardless of the disgrace disclosed.⁷³ Perhaps when our statute was first framed it was supposed necessary, in order to avoid this excess. Or it may be that the drafters in their desire to cut off this abuse of cross-examination did not note that the language they adopted was so broad as to permit the witness to withhold a merely disgracing answer even when the question is material to the issue in a criminal case or in a civil action. Their righteous zeal carried them too far. A witness who by hypothesis has committed a disgraceful act may conceal it though it is material to the administration of justice.

⁷² *Ante*, pp. 175, 176.

⁷³ WIGMORE, EVIDENCE, §986, pp. 1122, 1123.

Almost universally today no such privilege exists outside of Iowa.⁷⁴ A survey of the decisions in other jurisdictions during the last fourteen years has revealed none holding that a witness may decline to answer a material question merely upon the ground that the answer will disgrace him or expose him to ignominy.⁷⁵ Some Iowa cases seem to indicate that the privilege is almost ignored here in practice and fallen almost into desuetude.⁷⁶

⁷⁴ WIGMORE, EVIDENCE, §§2216, 2255.

⁷⁵ Some of the older and most of the recent decisions to the effect that he must answer are as follows: *Cook v. State*, (1912) 102 Ark. 363, 144 S. W. 221; *Clark v. Reese*, (1868) 35 Cal. 89; *Knowles v. Knowles*, (Del. 1859) 2 Houst. 133; *Weldon v. Burch*, (1851) 12 Ill. 374; *Waters v. West Chicago St. E. Co.*, (1902) 101 Ill. App. 265; *McCampbell v. McCampbell*, (1898) 103 Ky. 745, 46 S. W. 18; *Leach v. Commonwealth*, (1908) 33 Ky. Law Rep. 1016, 112 S. W. 595; *Jennings v. Prentice*, (1878) 39 Mich. 421; *Clementine v. State*, (1851) 14 Mo. 112; *State v. Crowe*, (1909) 39 Mont. 174, 102 Pac. 579; (*semble*) *State v. Staples*, (1866) 47 N. H. 113; *Meyer v. Mayo*, (1916) 159 N. Y. S. 405, 173 App. Div. 199; *Ex parte Heddon*, (1907) 29 Nev. 382, 90 Pac. 737; *In re Doran*, (Pa. 1846) 2 Par. Eq. Cas. 467; *Conway v. Clinton*, (1875) 1 Utah 215.

⁷⁶ In *Brown v. Kingsley*, (1874) 38 Iowa 220, the court in sustaining a refusal to give a disgracing answer seems influenced by its view that the matter sought was not material to the issue. In *State v. Allen*, (1896) 100 Iowa 7, 10, the only error the Supreme Court points out is the trial judge's manner in ordering the witness O'Farrell to answer; there is no allusion to error of substance in attempting to compel him to answer the disgracing questions, which were relevant to the issue.

In several instances of cross-examination calling for disgracing answers objections made by counsel being overruled, the witness answered; or the trial court excluded the questions, against objection, the Supreme Court contented itself with saying that the questions were proper or that the trial court properly exercised its discretion in excluding them, and in none of these opinions is any intimation that the witness had the privilege of declining to give disgracing answers. It is not contended that these cases hold that disgracing answers must be given. The point is that the privilege seems to be ignored in practice and the rule of restraint by the court at its discretion has come to supplant it. The theory of the old privilege against disgracing answers is, the question may be put but need not be answered. Some of the cases just referred to are, *State v. Weems*, (1895) 96 Iowa 426, 441; *State v. Pugsley*, (1888) 75 Iowa 742, 744; *State v. Bow*, (1890) 81 Iowa 138, 143, 144; *State v. Wasson*, (1905) 126 Iowa 320, 323; *State v. Brandenberger*, (1911) 151 Iowa 197, 204. The remark in *Dance v. McBride*, (1876) 43 Iowa 628, "it was proper that the jury should know it", suggests this same ignoring of the privilege. These cases seem to indicate a feeling in the profession, that if the question is proper it ought to be answered, notwithstanding mere disgrace is disclosed. The privilege seems to be claimed sporadically, however. *DeBoard v. Williams*, (1912) 155 Iowa 149, 160.

The writer ventures to suggest changes:

(1) That the words "or to expose him to public ignominy" be stricken from Section 1; and from Section 2 also where they would then have no meaning; and that there be added to the Code⁷⁷ a new section, as follows:

No witness is excused from answering a question that is material to the issue upon the mere ground that he would thereby be exposed to disgrace or ignominy.

This overcomes the chief error in our existing rule which permits material evidence to be withheld; but the privilege against disgracing answers being wholly abolished some restraint should be placed upon cross-examination to test credibility. This may be accomplished by the additional provision:

On cross-examination to test credibility a witness is excused from giving an answer not material to the issue though relevant to credibility if it would expose him to public ignominy, except as provided in Compiled Code §7320. (1897 Code §4613.)⁷⁸

A better solution, however, is that proposed by Professor Wigmore.⁷⁹ This involves a curtailment of the questioning, on cross-examination, into specific acts of bad conduct on the part of the witness. If this were cut off entirely, there would rarely be any opportunity of calling for a self-disgracing answer. In a few jurisdictions this sort of cross-examination is prohibited altogether. In most American jurisdictions the evil is greatly reduced by a rule that the extent to which such interrogation may go is controllable

⁷⁷ To follow 1897 Code §4611, Compiled Code §7318.

⁷⁸ Where it is provided: "A witness may be interrogated as to his previous conviction of a felony. But no other proof is competent, except the record thereof." He cannot be asked whether he has ever been *arrested* for a felony. This question is not only within the terms of the statute but having been arrested is irrelevant to credibility. *State v. Brown*, (1896) 100 Iowa 50, 54. An innocent person may be *arrested*. Likewise it is irrelevant to ask, Have you not been *accused* of burning a barn. *Germlinder v. Machinery Mut. Ins. Ass'n*, (1903) 120 Iowa 614, 617; but see *Livingston v. Heck*, (1903) 122 Iowa 74, 77. The question, Have you been *convicted* of a crime is not within the terms of the statute because not all crimes are felonies. *Hanners v. McClelland*, (1887) 74 Iowa 318, 322; *Palmer v. C. E. & M. Ey. Co.*, (1901) 113 Iowa 442.

⁷⁹ POCKET CODE OF EVIDENCE, Rule 105, Art. 2, p. 147.

by the trial court in its discretion,⁸⁰ and this rule is recognized by decisions in Iowa.⁸¹

Where the question is cut off the witness is saved the embarrassment of the inference from his refusal to answer; the protection is really effective. Under the rule of trial court's discretion to exclude the question (as distinguished from total prohibition of such questions) the witness must answer though disgrace is disclosed, where the court in its discretion so orders. Usually specific bad acts are of slight materiality to credibility or veracity unless they are specific acts of lack of veracity. So a limitation of the specific acts of bad conduct substantially to those that bear directly upon veracity should be made, if such inquiry is not wholly prohibited. The limitation just referred to as an improvement over the last proposal may be thus expressed:

On cross-examination of a witness to test his credibility he may be asked concerning bad conduct on his part only so far as it is relevant to the specific trait of veracity, unless some other trait is in the circumstances material to his credibility, but in all cases the trial court may limit the scope of facts so inquired into, except as provided in Compiled Code §7320 (1897 Code §4613).⁸²

These rules, of course, leave untouched the impeachment of a witness by means of the testimony of other witnesses which, in this State permits evidence of the witness's *reputation* for bad morality generally as well as his reputation for the specific vice of lack of veracity.⁸²

⁸⁰ WIGMORE, EVIDENCE, §983, p. 1114.

⁸¹ *State v. Weems*, (1895) 96 Iowa 426, 441; *State v. Chingren*, (1898) 105 Iowa 169, 173; *State v. Row*, (1890) 81 Iowa 138, 144; *State v. Osborne*, (1895) 96 Iowa 281, 284.

⁸² Compiled Code §7321 (1897 Code §4614). Evidence of *specific acts* of bad conduct, crime or immorality cannot be introduced to impeach a witness by means of the *testimony of other witnesses*. *State v. Woodworth*, (1884) 65 Iowa 141, 144, 145; *State v. Peffers*, (1890) 80 Iowa 580, 583; *State v. Seevers*, (1899) 108 Iowa 738, 741; *Hunt v. Railway Co.*, (1913) 160 Iowa 722, 727. This rule, of course, does not rest upon a policy against *self-disgrace* since if this evidence were admissible the impeaching witness would not be disgracing himself. The policy of it is to exclude extraneous issues of fact. WIGMORE, EVIDENCE, §§878, 979, also the remoteness of relevancy to credibility.

So in a criminal prosecution where evidence is offered for the accused to show good character, while the State may counter with evidence of general bad repute, specific acts of bad conduct not relevant to the charge are not admissible. *State v. Sterret*, (1887) 71 Iowa 386, 387.

So though a witness who has testified to the good reputation of the accused may be cross-examined as to his knowledge of *current rumors* or *repute* of the accused's having done specific bad acts, to show whether he does know the

Finally it should be noted that the changes suggested by the writer are in no sense a criticism of the Code Commission's splendid service in presenting the revised statement of the law in their proposed bill. The merit of that statement is found in their careful collection into Section 2 of numerous instances in our existing statutes where immunity is given to offset the privilege against self-crimination, and in more accurately and more concisely stating that immunity. The writer's suggestion is that while the legislature is at it, some reforms in substance be made (1) to require some material evidence to be given which the present Iowa law, contrary to well-founded usage elsewhere, permits witnesses to withhold and (2) to put some further restraint upon well recognized abuses of cross-examination.

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reputation of the accused; *State v. Arnold*, (1861) 12 Iowa 479, 487; *State v. Kimes*, (1911) 152 Iowa 240, 249; *State v. Rowell*, (1915) 172 Iowa 208, 214-216; yet he may not be questioned as to the fact of such reputed acts. *Gordon v. State*, (1856) 3 Iowa 410, 415; *State v. Rowell*, *supra*; *State v. McGee*, (1890) 81 Iowa 17, 19.

Nor may impeaching witnesses be asked as to particular vices of the witness sought to be impeached; *Kilburn v. Mullen*, (1867) 22 Iowa 498, 503; *State v. Seevers*, (1899) 108 Iowa 738, 741; *State v. Haupt*, (1904) 126 Iowa 152, 153; *State v. Gregory*, (1910) 148 Iowa 152, 154; but reputation for the specific vice of falsehood or lack of veracity is admissible; *State v. Teeter*, (1886) 69 Iowa 717, 719, 720; *Schoep v. Bankers' Alliance Ins. Co.*, (1898) 104 Iowa 354, 356; *Hunt v. Railway Co.*, (1913) 160 Iowa 722, 727, 728; the unfortunate dictum in *State v. Gregory*, (1910) 148 Iowa 152, 154, to the contrary was soon corrected in *Hunt v. Railway*, *supra*; reputation for veracity has always been admissible in Iowa; *Carter v. Cavanaugh*, (1848) 1 G. Gr. 171; *State v. Egan*, (1882) 59 Iowa 636, 637. It is more relevant to credibility than reputation for morality generally, and the Code (1897) §4614, Compiled Code §7321 in permitting the latter was not intended to exclude the former.

The general moral character of a witness, or his general reputation as to morals, not his character or life as known to the impeaching witness, may be shown. *State v. Egan*, (1882) 59 Iowa 636; *State v. Seevers*, (1899) 108 Iowa 738, 741.

A CONCILIATION LAW FOR IOWA

The Bulletin herewith publishes a bill which has been drawn by Hon. J. H. Trewin, chairman of the Code Commission, authorizing a new method of handling small claims. The bill requires in certain cases an attempt at conciliation before an action may be brought thereon. It has been approved officially by the Code Commission. The Bulletin deems the subject of importance, and will gladly give space in its pages for comments, favorable or unfavorable, on the desirability of this or similar proposals for securing more efficient administration of justice. It will especially welcome concrete suggestions applicable to conditions existing in this State.

The whole subject of the adaptation of the legal machinery to modern conditions has received much attention of late, both from lay and legal writers. One important phase of the matter, the relation of our system of courts to the needs of the man who cannot pay for expensive litigation, has been thoroughly and ably discussed by Reginald Heber Smith, of Boston, in his recently issued "JUSTICE AND THE POOR".¹ The author points out that to secure that freedom and equality of justice which are fundamental in our jurisprudence, and recognized in Federal and State Constitutions, we must have both impartiality in the substantive law giving the individual his rights, and an even-handed administration of the law. The first aspect seems not a serious one. "The body of substantive law, as a whole, is remarkably free from any taint of partiality. It is democratic to the core. Its rights are conferred and its liabilities imposed without respect of persons. . . . It deserves to be recognized as a remarkably satisfactory human achievement."²

It is in the enforcement of the legal rights given by the substantive law that the denial of justice comes. "It is the wide disparity between the ability of the richer and poorer classes to utilize the machinery of the law which is, at bottom, the cause of the present unrest and dissatisfaction."³ More specifically, Mr. Smith finds three defects in administration which result in a denial of

¹ This study is issued as Bulletin Number Thirteen by the Carnegie Foundation, 576 Fifth Avenue, New York.

² p. 13.

³ p. 15.

justice to the poor man. They are: (1) *delay*; (2) *expensive court costs and fees*; (3) *expense necessary in retaining counsel*. It seems relevant to note in passing that these defects do not constitute a denial of justice to the poor man alone. If the expense of securing redress for a wrong is more than the compensation recovered, there is a denial of justice to the plaintiff, whether he is rich or poor. It is harder on the poor man only because the loss means more to him than to one financially able to bear it. Providing adequate procedure for enforcement of small claims is an important legal problem, irrespective of the commercial rating of the claimant.

So well known are the three mentioned evils that no proof of their existence is necessary. As Mr. Smith points out, delays work to defeat justice in two ways; by making the time required to reduce a claim to judgment so long that a person gives up his case entirely; second, by forcing an unfair settlement on a party unable to wait. As a striking example, witness an instance occurring in Philadelphia before the creation of its municipal court, where it took a year and nine months, with eleven days in court for counsel and plaintiff, to collect a wage claim of ten dollars. He concludes, "Tedious proceedings and long delays . . . can be abolished whenever we so will it."

Court costs and fees are dealt with in three aspects; costs in trial court, costs in appealed cases and finally those expenses incurred for witness fees, briefs, transcripts and the like. The first class may be reduced by scaling all costs to a minimum and vesting discretionary power in the judges to permit *in forma pauperis* proceedings in all cases in all courts. The second class will automatically disappear with a unified court, as in England, when the appeal is affected merely by transfer from the trial to the appellate division. Each branch judicially knows the record of the other and uses all the original files. For the third class of expense, Mr. Smith can only suggest that the State provide a fund out of which needy suitors can secure necessary help. Ample evidence is shown that the present system of costs does close the door of justice to the poor because of their inability to pay. In Boston, for instance, records of the Legal Aid Society show, for a given period, that the fees required caused a total failure of justice in a given period to nearly one-fourth of the applicants for assistance requiring court action.⁴

The third defect, expense of counsel, is the greatest difficulty of

⁴ p. 28.

all. Mr. Smith would not do away with lawyers, they are indispensable to the administration of justice. And they must be paid if they are to live. On the assumption (surely a valid one) that single persons earning less than \$500 yearly, and that married men with dependents earning less than \$800 yearly, are unable to pay for legal services, it would appear a fair estimate that there are more than thirty-five million men, women, and children in this country who are financially unable to pay any appreciable amount for attorney's services.

There are nine agencies in use, to a greater or less extent, in alleviating conditions thus outlined. These are (1) small claims courts; (2) conciliation; (3) arbitration; (4) domestic relations courts; (5) administrative officials; (6) administrative tribunals; (7) assigned counsel; (8) defenders in criminal cases; (9) legal aid organizations. Mr. Smith gives an able discussion of each, devoting the most time and space to a description of legal aid society work, which was, in fact, the original purpose of the investigation and report. Our statute book already makes provision for arbitration.⁵ Inasmuch as the bills proposed for Iowa concern but the first two, only they will be touched upon here.

There is a clear distinction between a court of conciliation and a small claims court which it is well to keep in mind. The former "provides machinery for bringing the parties to a dispute together before an official who is recognized by both parties to be competent and impartial, so that they may have a fair opportunity to agree upon a settlement of their differences without the expense and delay incident to ordinary legal procedure, and without the engendering of the animosities that almost invariably arise out of contested suits at law." In the courts for small claims, on the other hand, the procedure, though informal, is adversary in its nature.⁶ The two features can be and are often combined in one tribunal.

Small claims courts are being established in this country to take care of petty litigation not adequately cared for elsewhere. The justice of the peace plan failed utterly in urban communities. The municipal courts, their successors, have lost sight of small cases. Cleveland, Chicago, Minneapolis, Portland, and Topeka, Leavenworth, and Kansas City, Kansas, have established small claims courts. These courts differ from each other in many respects, but their work, as a whole, has been so useful that Mr. Smith says of

⁵ See §§4385 to 4401, Code of 1897.

⁶ W. R. Vance, "A Proposed Court of Conciliation", 1 Minn. L. Rev. 107, 111.

them?⁷ "[They] show that as to small civil causes the defects of the traditional administration of justice can be easily eliminated. In these courts delay is entirely absent. Costs, either through reduction or abolition, cease to forbid access to the courts. The fundamental difficulty of the expense of lawyers is avoided by a simplicity of pleading and procedure in which there is no need of any attorney." If their promised advantages are to be realized three principles must be adhered to: (1) The small claims court must be a branch of a regular court organization; (2) the proceedings must be conducted without lawyers; (3) though procedural rules may be cast aside, rules of substantive law must be adhered to. "There is no reason", says the author, "why [these courts] should not be created immediately in every large city as an indispensable department of a modern municipal court." Do we need them in Iowa, and if so to what extent?

Conciliation as a method of settling legal controversies is often, but by no means necessarily associated with the small claims court. Mr. Smith concisely describes it: "It is an entirely voluntary affair, an informal proceeding by which the two disputants are enabled to discuss the issue before a trained and impartial third person having the dignity of judicial office, who explains to them the rules of law applicable, informs them of the uncertainties and expense of litigation, tries to arouse their friendly feelings and suppress their fighting instincts, and if an adjustment agreeable to the parties is reached, draws up a proper agreement, has it executed, and gives it the sanction of a judgment. All of this is done without prejudice to the parties if adjustment fails and a trial is rendered necessary."⁸

Conciliation has been used in Europe with great success. In Norway 75 per cent and in Denmark 90 per cent of all litigation appears to be settled in this way. In France, Germany, and Switzerland it has met with success in industrial disputes. In connection with the small claims courts recently established in this country, it seems to be making headway. The Minnesota State Bar Association's Committee reported that the Minneapolis court which contains the small claims and conciliation features had proved a great success.⁹

In connection with conciliation here in Iowa this recent statement of the secretary of the American Judicature Society is worth

⁷ p. 52

⁸ p. 60.

⁹ Proceedings, Minn. State Bar Ass'n, 1918, p. 183.

emphasizing: "Conciliation procedure is not in its nature peculiarly urban. There is everywhere a crying need for direct and simple justice and especially in the affairs of those who can least afford the luxury of litigation. There is no reason for thinking that the cities provide a method for litigating small civil claims inferior to that provided in the towns and rural districts."¹⁰

Mr. Smith says that conciliation is compounded of common sense and psychology. Whether Iowans with small claims to enforce contain the right proportions of these elements to make a conciliation court function successfully is a matter incapable of a *a priori* demonstration. We do know that in other places, where conditions are not more favorable than here, it is getting a good start.

Looking to the nature of a conciliation court, there are at least three conditions which must be complied with if the project is going to succeed. First, the conciliator ought to be a man learned in the law. The parties ought to feel that the advice furnished them in regard to conciliation is based upon actual legal rights and liabilities, just as fully as a decision in a more formal court would be. A claim does not need to be large to become the subject of bitter controversy. And is it not true that the more rancorous litigation becomes, the more vigorously each party insists that he wants but his legal rights? If the parties are to have enough confidence in the court to make it a success, it must be a law court.

Second, the conciliator must be one who has sympathy with and special ability for this particular type of work. This will be especially true at the start, while the new method, so great a departure from the traditional contentious proceeding, is still on trial. The success in Cleveland is in large part due to the personality of Judge Levine. So too in Minneapolis. Dean Vance's tribute to the judge is also an excellent summary of the qualifications such an officer must possess. "Judge Salmon's courtesy and patience, his kindly manner and deep sympathy with the misfortunes of the poor, his tact and sound judgment, have enabled him to carry on this new kind of judicial work . . . with gratifying success."¹¹

Finally the court must be free to work out its methods and procedure in the light of experience as it goes along. Minute statutory directions, however carefully planned, are undesirable, because

¹⁰ Herbert Harley, "Justice or Litigation", 6 Va. L. Rev. 143, 151, Dec. 1919.

¹¹ "The Minneapolis Court of Conciliation in Operation", W. R. Vance, 2 Minn. L. Rev. 491, 499.

we do not yet even know what the problems will be. They are, however, problems of administration, concerning which the men actually doing the work will be best informed.

The proposed bill takes care of all this. The judge may act as conciliator. Or he may appoint someone else, who would undoubtedly be a lawyer in sympathy with the work. Further, the bill makes the establishment of the conciliation branch optional with the judges. It need only be tried by those interested in the movement for better administration of justice, and in those communities where it is believed desirable. Finally, it leaves the court free to work out for itself the best methods of making the project work.

If conciliation does work successfully, it means a big step forward. If it does not, we are no worse off than we were before. Is not the experiment worth a trial?

Following is the proposed bill.

Be It Enacted by the General Assembly of the State of Iowa:

That chapter four (4) of title twenty-eight (28) of the compiled code of Iowa is amended by adding thereto the following:

SECTION 1. RULES FOR CONCILIATION—CONCILIATORS

The judges of the district court for their districts and the judges of the municipal court for their districts may adopt and enforce rules prescribing the manner of settlement of controversies by conciliation and the duties of the clerks of the several courts in respect thereto; may appoint conciliators or any judge may act as such, but no judge shall preside at the trial of any action involving a controversy in which he has acted as conciliator.

SEC. 2. PROCEDURE

No party shall be represented by counsel, except by consent of the conciliator. The proceedings shall be informal and no record thereof shall be preserved except the agreement of settlement signed by the parties. The judge may direct the same to be filed in the office of the clerk and judgment to be entered thereon.

SEC. 3. BAR TO ACTION

In districts in which rules for conciliation are adopted, and conciliators appointed, no person may maintain an action for the recovery of one hundred dollars (\$100.00) or less unless he alleges and proves by certificate of a conciliator that he has made a good faith effort to settle the controversy; but this section shall not apply to suits aided by attachment, to enforce a lien, or for replevin.

SEC. 4. SPEEDY DETERMINATION CERTAIN CAUSES

Such judges shall adopt rules for the speedy determination of causes involving comparatively small amounts as stated by such rules, and the clerk shall enter such causes upon a separate short cause calendar. It shall be the duty of the court to set aside a day or days each week when such causes will be heard. Before entering upon the trial of any such cause, the judge or court shall, if practicable, bring the parties together and endeavor to secure a settlement thereof by conciliation or arbitration.

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DUTY TO RETREAT FROM ASSAULT.—"The party assailed must . . . flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment: or as far as the fierceness of the assault will permit him: for it may be so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then in his defense he may kill his assailant instantly." This was the common law rule at the time of Blackstone.¹ Modern criminal law, however, recognizes two separate and distinct rules: the first requiring retreat and sometimes spoken of as the "flight rule"; the second not requiring retreat, but permitting the assailed to stand his ground and meet force with force, even to the extent of taking human life.² The second doctrine is criticized as a development from an erroneous distinction between excusable and justifiable homicide made by Sir Michael Foster in his essay on "Homicide", published in 1762, and which has been frequently cited with approval by our courts.³ Regardless of origin, both doctrines are firmly established in their respective jurisdictions.

Before considering these two rules, it may be well to eliminate from this discussion two other situations in which the act of retreating may play an important part. It is a well recognized principle of criminal law that an assailant himself cannot rely upon self-defense as an excuse for wounding or killing another, unless he has withdrawn from the affray as far as he possibly can and has clearly announced his desire for peace.⁴ Likewise, where two parties mutually engage in combat, neither can rely upon self-defense when he has killed or wounded his co-combatant unless he has refused further combat.⁵ Retreat is often a very convenient and practical method of manifesting this desire for peace. In cases of this nature, the jury instructions may contain references to "retreat" in the sense of a withdrawal, but such instructions refer

¹ 4 BL. COM. (Hammond's ed.), p. 229.

² 2 L. R. A. (N. S.) 49, note to *State v. Gardner*, 96 Minn. 318, 104 N. W. 971.

³ 16 Harvard Law Review 567 at 573, Prof. Joseph H. Beale on "Retreat from Murderous Assault."

⁴ *State v. Cross*, 68 Iowa 180, 26 N. W. 62; *State v. Jones*, 125 Iowa 508, 99 N. W. 179; collection of cases in note, L. R. A. 1915 F 656.

⁵ *State v. Dillon*, 74 Iowa 653, 38 N. W. 525; *State v. Whitnah*, 129 Iowa 211, 105 N. W. 432; collection of cases in note L. R. A. 1915 F 656.

to the assailant and not the assailed, and we must distinguish such cases from those in which the assailed was free from fault.

The jurisdictions which follow the retreat rule as stated by Blackstone allow the assailed to stand his ground only when it reasonably appears that he cannot retreat with safety.⁶ In determining reasonable safety, it is not merely sufficient for the assailed to show that the circumstances were such that it would have been hazardous to retreat. Retreat must have increased the danger, or the circumstances must have been such as to impress the assailed as a reasonable man that the peril would have been increased by such retreat.⁷ A recent decision by the Iowa Supreme Court has made it clear, that, in determining whether the assailed acted reasonably, the jury must consider the circumstances existing at the time of the wounding or killing, and not the conditions existing at the commencement of the affray, for any other interpretation would deprive the assailed person of the right of making any defense.⁸

Three general exceptions have been made by many jurisdictions to this retreat rule. In the first place, no court requires retreat in case the assault is made upon a person in his own habitation, for under such circumstances the assailed is deemed to be "at the wall and in his castle".⁹ In the second place, some courts do not require retreat in case of an assault made upon one on his own premises.¹⁰ By "premises" the courts seem to refer to the curtilage of the dwelling.¹¹ In the leading federal case adopting this exception, the assailed was in his orchard some fifty or sixty yards from his house.¹² The exception has received considerable criticism.¹³ In the third place, some jurisdictions allow the assailed to stand his ground in order to prevent the commission of a felony. One leading case says that, in resistance to an attempt to rob, actually in execution, "the person is not required to retreat or use other and less radical means than the killing of his assailant to render the attempt abortive, even though such means may be resorted to with entire safety to himself, and would manifestly be successful".¹⁴

By statute, Iowa allows the injured person to make resistance necessary to prevent an offense against his person or injury to

⁶ *Allen v. U. S.*, 164 U. S. 492, 497, 17 Sup. Ct. 154, 156, 41 L. Ed. 528; *State v. Thomas*, 151 Iowa 572, 132 N. W. 51; *Washington v. State*, 125 Ala. 40, 28 So. 78; *Hill v. State*, 146 Ala. 51, 41 So. 621; *State v. Wilson*, 98 Mo. 440, 11 S. W. 985.

⁷ *Bell v. State*, 115 Ala. 25, 22 So. 526; *Pugh v. State*, 132 Ala. 1, 31 So. 727.

⁸ *State v. Gough*, 174 N. W. 279. (Iowa Sup. Ct.)

⁹ *State v. Middleham*, 62 Iowa 150, 17 N. W. 446; *State v. Bennett*, 128 Iowa 713, 105 N. W. 324; *Alberty v. U. S.*, 162 U. S. 499, 16 Sup. Ct. 864, 40 L. Ed. 1051; 13 R. C. L. 829.

¹⁰ *Beard v. U. S.*, 158 U. S. 550, 15 Sup. Ct. 962, 39 L. Ed. 1086; *State v. Linhoff*, 121 Iowa 632, 97 N. W. 77; *State v. Bennett*, 128 Iowa 713, 105 N. W. 324; *State v. Thompson*, 71 Iowa 503, 32 N. W. 476; *State v. Rutledge*, 135 Iowa 590, 113 N. W. 461.

¹¹ *State v. Bennett*, *supra*; *Lee v. State*, 92 Ala. 15, 9 So. 407; *State v. Brooks*, 79 S. C. 144, 60 S. E. 518, 128 A. S. R. 836; 13 R. C. L. 830.

¹² *Beard v. U. S.*, *supra*.

¹³ Prof. Beale in 16 Harvard Law Review on 580.

¹⁴ *State v. Bonfiglio*, 67 N. J. L. 239, 52 Atl. 712.

property in his lawful possession.¹⁵ In commenting upon this statute, our Supreme Court has said that, "The nature of the resistance, however, must as before, have regard to the nature of the offense about to be committed. Under the statute I may slay a robber or burglar in my dwelling as I might at common law. But if one attempt to commit an ordinary assault and battery upon me, or take my goods, or cut down my timber as a trespasser merely, or is simply attempting to pick my pocket, though I may justify beating him so as to make him desist and sufficiently accomplish the purpose, yet if I make use of a deadly weapon and slay him, I will not stand justified in the eyes of the law".¹⁶ Such an interpretation seems hardly to give the effect called for by the words of the statute. The Iowa court does not require the assailed to retreat from his own habitation or premises, but aside from these two exceptions, it seems to be well established in this State that "A person assaulted may always meet force with force, but no more than a battery may be administered unless this seems to be necessary to protect life or body from harm, and not then if the assailed party have reasonable opportunity to withdraw and avoid the conflict, and it so appears to him, acting as an ordinarily prudent person".¹⁷

The courts which are the most lenient are those which allow the person assaulted to stand his ground merely because he is in the right.¹⁸ These courts are refusing to place a higher value upon human life than upon a temporary deprivation of the personal liberties of the assailed.¹⁹ It is upon this argument that the advocates of the retreat rule rest their case. Advocates of the lenient rule, however, contend that the rule requiring retreat will tend to produce a race of cowards. When we consider that this "flight rule" has been recognized for several hundred years, can we not question their conclusion?

In summary, we may say that the Iowa Court requires retreat with the exception of assault committed in the habitation or on the premises of the deceased. Our statute, allowing defense in cases of attempt to commit public offenses, as interpreted, probably does not enlarge these exceptions. No Iowa case goes so far as to allow a man to stand his ground merely because he is in the right, when he could avoid the fatal act by retreat and without increasing the danger to himself.

¹⁵ Code, §5102, "Lawful resistance to the commission of a public offense may be made by the party about to be injured, or by others." §5103, "Resistance sufficient to prevent the offense may be made by the party about to be injured: (1) To prevent offense against his person. (2) To prevent an illegal attempt by force to take or injure property in his lawful possession."

¹⁶ *State v. Kennedy*, 20 Iowa 569.

¹⁷ *State v. Abarr*, 39 Iowa 185; *State v. Mahan*, 68 Iowa 304, 20 N. W. 499; *State v. Donnelly*, 69 Iowa 705, 27 N. W. 369; *State v. Jones*, 89 Iowa 182, 56 N. W. 427; *State v. Goering*, 106 Iowa 636, 77 N. W. 327; *State v. Evenson*, 122 Iowa 88, 97 N. W. 979; *State v. Dyer*, 147 Iowa 217, 124 N. W. 629; *State v. Brackey*, 175 Iowa 599, 157 N. W. 198; *State v. Stansberry*, 182 Iowa 910, 166 N. W. 359; *State v. Gough*, 174 N. W. 279 (Iowa Sup. Ct.).

¹⁸ Collection of cases in note in 2 L. R. A. (N. S.) 55; *La Rue v. State*, 64 Ark. 144, 41 S. W. 53; *Voight v. State*, 53 Tex. Cr. App. 268, 109 S. W. 205; *State v. Donahue*, 79 W. Va. 260, 90 S. E. 834.

¹⁹ *State v. Bartlett*, 170 Mo. 658, 71 S. W. 148, 151.

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MAY A PROMISSORY NOTE BE PAYABLE IN FOREIGN MONEY?¹ *

A promissory note must be payable in money.² Thus disputes as

*This discussion had been prepared by Professor Perkins and was ready for publication when there appeared another article on almost the same question, "The Theory of Money in the Law of Commercial Instruments," 29 Yale L. Journal 606, by Professor Herman Oliphant, of the University of Chicago. Since this magazine and the Yale Law Journal come, for the most part, into the hands of different readers, the editor has prevailed upon Mr. Perkins to grant permission to print this discussion notwithstanding Mr. Oliphant's earlier appearance. Mr. Perkins has since added some comment on Mr. Oliphant's development of the subject.—H. F. G.

¹ The same principles are applicable to a bill of exchange, the discussion being limited to promissory notes for simplicity of statement only. The term "negotiable instruments" is not here used for two reasons: first, because in the absence of statute the answer to this problem should be the same whether the instrument is in form negotiable or non-negotiable, as it is not a note at all unless payable in the proper medium. (*Bettis v. Weller*, (1870) 30 U. C. Q. B. 23; and see "Nonnegotiable Bills and Notes" by Professor Goodrich in 5 Iowa Law Bulletin 65); second, because it would unnecessarily involve the question of the negotiability of certain instruments that are not promissory notes or bills of exchange.

² *King v. Hamilton*, (1882) 12 Fed. 478, 479, 8 Sawy. 167; *Black v. Ward*, (1873) 27 Mich. 191, 192; *Hatch v. National Bank*, (1900) 94 Me. 348, 350. As to bills of exchange, *Chrysler v. Renois*, (1870) 43 N. Y. 209, 212; CHITTY ON BILLS, (10th Am. ed.) 132. For an extensive list of citations see 8 C. J., p. 130, notes 57 to 66 inclusive. In some states instruments in the form of promissory notes except that they are payable in chattels are treated as promissory notes as far as the form of declaration is concerned. *Dewey v. Washburn*, (1840) 12 Vt. 580; *Denison v. Tyson*, (1845) 17 Vt. 549; *Roberts v. Smith*, (1886) 58 Vt. 492, 4 Atl. 709, 56 Am. Rep. 567. Sometimes by statute the scope of promissory notes has been enlarged to include promises to pay something other than money. *Goding v. Britain*, (1832) 1 Stew. & P. (Ala.) 282. And see §5907 of the Compiled Code of Iowa (1919) in reference to non-negotiable instruments. Negotiable bills and notes must be for the payment of money under the Negotiable Instruments Law, §1, (2) and §5.

to whether promissory notes may be payable in bank notes³ or in "current funds" or "currency"⁴ turn upon whether such instruments do or do not call for payment in money.⁵ If the promise in

³ Bank notes are not money and hence an instrument so payable is not a bill or note. Professor Oliphant, while conceding that the majority of the cases have accepted this theory, maintains that it is unsound. See the *Addendum*. The cases are collected in 8 C. J., p. 133, Notes 87 to 89 inclusive. The New York cases there cited *contra* rest upon the notion that bank notes current in New York are so far treated as money by business men that they should be so considered by the courts. Thus in *Judah v. Harris*, (1821) 19 Johns. 144, it was said: "In *Keith v. Jones* [9 Johns. Rep. 120] it was held that a note payable in York state bills or specie was the same thing as being made payable in lawful current money of the State; for the bills mentioned mean bank paper, which is here, in conformity with common usage, regarded as cash." But see *Thompson v. Sloan*, (1840) 23 Wend. (N. Y.) 71, 75, where it is said: "In *McCormick v. Trotter*, I fear we were somewhat justly criticised for the high ground on which we had placed all our State bills in *Keith v. Jones*." See also note 5.

⁴ The cases are collected in 8 C. J., pp. 131 and 132, notes 77 to 82 inclusive. Statements can be found to the effect that these words "*ex vi termini* mean money" (NORTON ON BILLS AND NOTES, p. 65), that they "*prima facie*" designate money (*ibid.*), that they "*prima facie*" do not mean money though it may be shown that "the term used to describe the funds in which it was made payable was understood to mean money" under "customs prevailing at the time and place of its execution" (8 C. J., p. 132, note 80 [b], or that they "include other things besides money" (*Ibid.*, note 81). It is submitted that it is only the greater precision in which each of two rules is stated by some courts than by others that gives the appearance of four distinct rules here. In *Black v. Ward*, (1873) 27 Mich. 191, 194 and 195, 15 Am. Rep. 162, it is said: "The only cases in which it has been held that 'currency' does not mean money (except where it has been qualified by some further definition) are certain cases in Iowa and Wisconsin, all of which rest entirely upon the authority of decisions where the paper in question was expressly payable in bank notes." In *Trebilcock v. Wilson*, (1871) 12 Wall. (U. S.) 687, 695, 20 L. Ed. 460, it is suggested that the terms "in specie" and "in currency" are used to designate coins and legal tender notes respectively. In *Hatch v. National Bank*, (1900) 94 Me. 348, it is intimated that since the appearance of legal tender notes it has been the practice to require payment in "gold", "silver", "legal tender notes", or, if any of the three would suffice, in "current funds". In a recent case it was said: "The better rule now seems to be that instruments of the kind in question, payable in 'current funds' or in 'currency' are payable in money." *Milliken v. Security Trust Co.*, (1918) 118 N. E. (Ind.) 568. This case was relied on as authority in *Kuhn v. National City Bank*, (1918) 119 N. E. (Ind.) 145.

⁵ Unfortunately this problem has seldom been properly analyzed in the cases. It involves two separate problems which have frequently not been kept distinct. The first inquiry should be to ascertain what is meant by the expression used; and after this is determined it should be decided whether an instrument pay-

a note specifies the amount only, it is dischargeable in whatever is legal tender for such sum at the place of payment. This is true whether the instrument is payable within or without the country in which it is made.⁶ It might have been quite reasonable for the law to have required that promissory notes should include no more particular specifications as to payment, leaving promises to deliver any special kind of money in the field of instruments that call for the delivery of commodities. But this the law did not do.⁷ Near

able in the medium which this term is interpreted to mean, is a promissory note. If "currency" is used to distinguish one kind of money (legal tender notes) from another kind (coined money) denoted by "specie"; as suggested in some cases (see note 4), it is clear that the use of this word in an instrument will not prevent this instrument from being a promissory note. The same is true of the expression "current funds" if it is used to mean that payment will be acceptable in either gold, silver or legal tender notes as suggested by the court in *Hatch v. National Bank* (see note 4). But if these terms are interpreted to mean, or to include within their meaning, bank notes and bank bills, then the inquiry is whether a substitute for money, if it commonly passes current as such, may take the place of money as the medium of payment in a promissory note, which is itself also a substitute for money. If so, then in any community in which tobacco or cotton or gold dust commonly passed as substitutes for money a note could be payable in such commodities. Also, starting with this premise, if the notes or bills of some private mercantile house were commonly accepted in the place of money in a given community, a note could be made payable in such paper. To do this is to fail to distinguish between the medium in which a note should be payable and substitutes which may be offered and accepted in discharge of a money obligation. To allow a substitute for money to be payable in a substitute for money is essentially unsound. If it is desired to give bank bills a standing which will permit them to be the medium in which a note is payable, they should be properly secured and made legal tender by legislation. While there are cases that have flatly held that bank notes are money (*Klauber v. Biggerstaff*, (1879) 47 Wis. 551, 3 N. W. 357, 32 Am. Rep. 773), it is submitted that a study of the cases tends to indicate that such decisions are based upon a misunderstanding of the dispute as to instruments payable in "currency" or in "current funds". As said by Ames (2 Ames Cases on Bills and Notes 828), "an instrument is not a bill or note if payable in 'bank notes' unless they are legal tender. *Rex v. Wilcox*, I. 39 and n. 2." See also, 1 DANIEL ON NEGOTIABLE INSTRUMENTS, §56; NORTON ON BILLS AND NOTES, p. 61; STORY ON PROMISSORY NOTES, §18.

⁶ *Williamson v. Smith & Walker*, (1860) 1 Cold. (Tenn.) 1, 78 Am. Dec. 478. See also *Comstock v. Smith*, (1870) 20 Mich. 338; *Crawford v. Beard*, (1864), 14 U. C. C. P. 87.

⁷ *Trebilcock v. Wilson*, (1871) 12 Wall. (U. S.) 687, 20 L. Ed. 460; *Strickland v. Holbrooke*, (1888) 75 Cal. 268, 17 Pac. 204; *Wood v. Bullens*, (1863) 6 Allen (Mass.) 516; *Chrysler v. Renois*, (1870) 43 N. Y. 209; *Kelly v. Ferguson*, (1873) 46 How. Pr. (N. Y.) 411; *Van Alstyne v. Sorley*, (1870) 32 Tex. 518; *St. Stephen Branch Railway Co. v. Black*, (1870) 2 Hannay (N. B.) 139.

the time of the Legal Tender Act⁶ it was common practice to make notes payable in "United States gold coin",⁹ in "specie",¹⁰ or in "legal tender notes".¹¹ Such stipulations were uniformly held not to prevent the instrument from being a good promissory note. As it was said in *Trebilcock v. Wilson*:¹² "The use of these terms, *in specie*, does not assimilate the note to an instrument in which the amount stated is payable in chattels; as, for example, to a contract to pay a specified sum in lumber, or in fruit, or grain." Not only does the law recognize such instruments and require a tender of the particular kind of money specified therein, but if suit is brought on a note payable "in specie" for example, the judgment is entered payable in coined dollars.¹³

Having seen that the requirement that a promissory note must be payable in money does not necessitate a promise to pay money generally, but permits a promise to pay in some particular kind of

⁶ For a discussion of the constitutionality of this legislation see 2 DANIEL ON NEGOTIABLE INSTRUMENTS, §§1246 to 1248 inclusive, and the cases cited.

⁹ *Strickland v. Holbrooke*, (1888) 75 Cal. 268, 17 Pac. 204.

¹⁰ *Trebilcock v. Wilson*, (1871) 12 Wall. (U. S.) 687, 20 L. Ed. 460; *Wood v. Bullens*, (1863) 6 Allen (Mass.) 516; *Van Alstyne v. Sorley*, (1870) 32 Tex. 518.

¹¹ *Kelly v. Ferguson*, (1873) 46 How. Pr. (N. Y.) 411.

¹² (1871) 12 Wall. (U. S.) 687, 694, 20 L. Ed. 460. See also *Wood v. Bullens*, (1863) 6 Allen (Mass.) 516, 518, where it was said: "this position assumes that specie is to be regarded as an article of merchandise, and not as money", which the court proves is not true. The most recent holding that an instrument is not rendered non-negotiable by a promise to pay "in United States gold coin" is *Eastman v. Sunset Park Land Co.*, (1918) 170 Pac. (Cal. App.) 642.

¹³ *Trebilcock v. Wilson*, (1871) 12 Wall. (U. S.) 687, 20 L. Ed. 460; *Chrysler v. Renois*, (1870) 43 N. Y. 209. See also *Bronson v. Rodes*, (1868) 7 Wall. (U. S.) 229, 19 L. Ed. 141, 36 How. Pr. 365; *Butler v. Horwitz*, (1868) 7 Wall. (U. S.) 258, 19 L. Ed. 149; *Dutton v. Pailaret*, (1866) 52 Pa. 109, 91 Am. Dec. 185; (affirmed, 154 U. S. 563 Appendix, 14 S. Ct. 1200, 19 L. Ed. 165). *Contra*, *Wood v. Bullens*, (1863) 6 Allen (Mass.) 516; *Van Alstyne v. Sorley*, (1870) 32 Tex. 518. Of the cases *contra* it is to be said that the Massachusetts court merely mentioned this in a single sentence in a case in which the point had not been argued to the court because plaintiff's counsel had not requested a judgment payable in coined money, but had attempted to secure judgment for principal and interest plus a sum to represent the "premium" for gold coin (which extra sum was refused on the ground that such a judgment might be paid in gold coin if the sheriff could secure it); and the other case was grounded on the notion that judgment so payable could be entered only in a suit on an instrument drawn prior to the enactment of the Legal Tender Act.

money, it becomes important to inquire whether a different rule will apply if the special medium of payment happens to be money that is foreign to the country in which the instrument is payable. At the start of this inquiry one situation must be eliminated. Legislation may bring within the class of legal tender, certain coins from the mints of other countries.¹⁴ These are foreign coins in that jurisdiction in one sense, but as they are a part of its own legal tender they do not fall within the term "foreign money" in the sense in which we are using it here.

In an early Massachusetts case¹⁵ an instrument was held to be a negotiable promissory note although the promise was to pay "in foreign money". The court, however, discloses neither reason nor authority for this decision. In the famous New York case of *Thompson v. Sloan*¹⁶ the court held otherwise. In both of these cases the question was discussed from the standpoint of whether the instrument involved was or was not negotiable. But if an instrument in the form of a note contains appropriate words of negotiability, as these did, a decision to the effect that it is not negotiable is really a holding that it is not a note at all,¹⁷ and the opinions could have been couched in such language with equal force and more precision. The only other intimation we have on this point in New York, aside from two cases to be mentioned presently,¹⁸ is in line with *Thompson v. Sloan*,¹⁹ but the case has been

¹⁴ *Thompson v. Sloan*, (1840) 23 Wend. (N. Y.) 71, 35 Am. Dec. 546 (indicating the existence of such a law in Canada); *St. Stephen Branch Railway Co. v. Black*, (1870) 2 Hannay (N. B.) 139; *Mather v. Kinike*, (1866) 1 P. F. Smith (Pa.) 425, 429. In *Mather v. Kinike* it was said: "though several Acts of Congress . . . had made foreign coins legal tenders, they were all repealed by the Act of 27th February, 1857."

¹⁵ *Sanger v. Stimpson*, (1811) 8 Mass. 260.

¹⁶ (1840) 23 Wend. 71, 35 Am. Dec. 546.

¹⁷ See Note 1.

¹⁸ *Hebblethwaite v. Flint*, (1918) 173 N. Y. S. 81, 185 App. Div. 249; *Brown v. Perera*, (1918) 176 N. Y. S. 215 (App. Div.).

¹⁹ *Kelly v. Ferguson*, (1873) 46 How. Pr. 411. Here it was held that an instrument payable "in legal tender notes issued by the government of the United States", if made in the United States and not expressed to be payable elsewhere, is a good promissory note. In *Chrysler v. Enois*, (1870) 43 N. Y. 209, the suit was on a draft made in Montreal and payable in New York, calling for "1,205 gold dollars". The referee interpreted this as meaning so many Canadian gold dollars, and as such money was then worth more than the gold dollars of the United States, he was of opinion that the plaintiff was entitled to \$1831.60 plus interest, in American money. Although no question was raised on the point by counsel, the referee treated it as a good bill of

subjected to much criticism elsewhere. In *Black v. Ward*,²⁰ which involved a suit upon "a note made and endorsed in Michigan, but payable in Canada expressly in 'Canada currency'", the Michigan court said:²¹

"In *Thompson v. Sloan*, the supreme court of New York held that a note payable in Buffalo in 'Canada money' was not negotiable. This, however, is not, we think, in accordance with the general current of decision. Judge Story says, 'If it be payable in money, it is of no consequence in the currency or money of what country it is payable. It may be payable in the currency or money of England, France, Spain, Holland, Italy, America, or any country.'—Story on Bills, §43; Chitty on Bills, 153, 158."

This criticism, however, is *obiter* only, although the court did not seem to realize that fact, for the reason that the cases are entirely different in respect to the place of payment^{21a} and the actual decisions are altogether consistent. In the instant case the "Canada currency" was to be paid in Canada, whereas in the New York case the "Canada money" was payable in New York. The instrument that was payable in Canada would have been payable in Canada currency if the word "currency" had been used alone, so that the word "Canada" added nothing to its legal effect. That case would have involved the same point as was at issue in *Thompson v. Sloan* if the descriptive expression used had been "United States" in-

exchange. But the court did not have occasion to pass upon this question of whether an order for the payment of Canadian coin in New York would be a good bill of exchange, because it held that the order in question meant 1205 dollars in United States money. This was a correct interpretation of the instrument. See STORY, CONFLICT OF LAWS, §272 a.

²⁰ (1873) 27 Mich. 191, 15 Am. Rep. 162.

²¹ *Ibid.*, p. 194.

^{21a} Professor Oliphant inquires "whether there is a distinction between an instrument drawn in New York and payable there in a medium of payment foreign to that place and an instrument drawn in London and payable in New York in a medium of payment which is money in London but not in New York". The answer must be that there is no difference as far as this problem is concerned. If legal tender has any bearing on the matter it must always raise the inquiry whether a proper tender according to the terms of the instrument would be legal tender or would be something that is not legal tender. This must always depend upon the place where tender should be made regardless of where the instrument was drawn. The inquiry seems to have been prompted by a statement of Mr. Justice Field in *Bull v. Bank of Kasson*, (1887) 123 U. S. 105, 8 Sup. Ct. 62, in which he speaks of the "law of the country where the instrument is drawn or payable." But as the instruments there involved were both drawn and payable in this country, the decision is not an authority for the proposition that the place of drawing will control. See *Greenwood v. Foley*, (1872) 22 U. C. C. P. 352.

stead of "Canada". As this vital distinction is entirely overlooked by the court, its comment on the subject is not entitled to much consideration even as dictum.

It was thought by the Texas court in *Hogue v. Williamson*²² that these two cases might be "reconciled". But although the court's statement of the two cases shows clearly that they decide essentially different problems, this fact is overlooked and the attempt to "reconcile" them is far-fetched indeed. Says the court:

"In *Black v. Ward*, 27 Michigan, 191, it is held, that a note made in Michigan payable in Canada in 'Canada currency,' is payable in money, and is therefore negotiable. But in *Thompson v. Sloan*, 23 Wendell, 71, a note made in New York and payable there in 'Canada currency,' was held not negotiable. The court, however, say: 'This view of the case is not incompatible with a bill or note payable in money of a foreign denomination, or any other denomination, being negotiable, for it can be paid in our own coin of equivalent value, to which it is always reduced by a recovery. A note payable in pounds, shillings, and pence, made in any country, is but another mode of expressing the amount in dollars and cents, and is so understood judicially. The course therefore in an action on such instrument is to aver and prove the value of the sum expressed in our own tenderable coin.' This decision was made in 1840, and it is to be inferred that at that time the dollar was not a denomination of the lawful money of Canada. We also infer, that when the Michigan case arose, this had been changed and the denomination of Canada money corresponded with that of the United States. Upon this theory, it would seem that the cases may be reconciled. The language quoted from the opinion in *Thompson v. Sloan*, supra, indicates clearly, that if the money named in the note had been a denomination of Canada money, the ruling would have been different, unless, perchance, the word 'currency' would have affected the question."

The lack of care used in preparing this opinion²³ is manifest by the fact that "currency" was not the word used in the instrument involved in the New York case. The word used was "money".²⁴ Nor does it appear from the quotation that the New York court would have made a different ruling if the "money named in the note had been a denomination of Canada money", unless it had been used as "but another mode of expressing the amount in dollars and cents" of "our own tenderable coin". For had the Texas court completed the paragraph from which it started to quote, it would have seen that the New York court would sustain the negotiability of an instrument payable in New York "in our own tender-

²² (1893) 85 Tex. 553, 22 S. W. 580.

²³ By Mr. Justice Gaines.

²⁴ As a matter of fact there was some evidence that by usage where this instrument was drawn "*Canada money* meant *bills of the Canada banks*", but the word "currency" was not used in the instrument. This was the word used in the Michigan note.

able coin" no matter what denomination of money was used to express that sum; but would not recognize the validity of a note, as such, for which "Canada money, a specific article, would be lawful tender". That is, while the New York court used the expression "payable in money of a foreign denomination", it meant only where the sum to be paid is measured in that manner, for it adds that it "can be paid in our own coin of equivalent value". Hence, while the language used is unfortunate, it is quite clear that if the actual payment was to be made in Canadian coins, its decision would have been the same even if Canadian coins of a certain denomination had been specified.²⁵

The actual decision in *Hogue v. Williamson* probably reached a just result²⁶ because the instrument there involved seems to have been made in Mexico,²⁷ which was also the place of payment since there was no specification that it was payable elsewhere. As the promise was to pay "one thousand Mexican silver dollars" in Mexico, no question of "foreign money" should have arisen as far as the instrument itself was concerned. But the court treated the instrument as one payable in the United States in "foreign

²⁵ In 1 DANIEL ON NEGOTIABLE INSTRUMENTS, §58, the author, apparently adopting the same interpretation as is used in *Hogue v. Williamson*, fails to see "how the idea of its possessing a negotiable quality is excluded by the mere fact that the denomination of foreign money is not set out", without seeing that the distinction in the minds of the New York judges was between an instrument expressing a sum in terms of foreign money and one requiring the actual delivery of foreign coins.

²⁶ The only evidence of the place of making the instrument is that it is dated at "Saltillo". There is little doubt that this was Saltillo, the capital of Coahuila, Mexico. The court could not have taken judicial notice that there is only one Saltillo, however, and could not without proof of the fact, assume that this note was made, and hence payable, in Mexico rather than in the United States. (*Kearney v. King*, (1819) 2 B. and Ald. 301.) But if the note was really payable in Mexico the plaintiff should have been allowed to prove that fact, and to bring suit upon it in this country. (*Greenwood v. Foley*, (1872) 22 U. C. C. P. 352.) In *Kearney v. King* the note was dated at "Dublin" and sued upon in England with no other indication as to where it was made. The court, after deciding that they could not take judicial notice that there was only one Dublin in the world and hence that the declaration on its face indicated an English instrument, held that it was a fatal variance to prove that the instrument was made and payable in Ireland, because the denomination "pounds" did not represent the same amount of value in the two places, the Irish pound being worth one-twelfth less than the English. There was no such possibility of variance in the Texas case because the instrument was payable not in "dollars" but in "Mexican silver dollars".

²⁷ See last note.

money”²⁸ and then decided that it was a negotiable promissory note, resting upon the authority of *Black v. Ward*, in which no such issue was involved.²⁹

In *King v. Hamilton*³⁰ the action was upon an instrument in the form of a promissory note for “500 pounds sterling, money of the United Kingdom of Great Britain and Ireland” with no allegation as to where the instrument was made payable. As suit was brought in the United States, the instrument would be presumed to be made and payable here in the absence of proof to the contrary.³¹ The court fails utterly to distinguish between an instrument in which the sum to be paid is measured in terms of foreign money and one which calls for the actual delivery of foreign coins. This is shown by the statement that “a note payable in pounds sterling or British sovereigns is payable in ‘money’ just as much and as certainly as if it was payable in dollars”, followed by a holding that whatever the place of payment this instrument was payable in money, on the authority of *Thompson v. Sloan* which held the exact opposite of this. Finally the court says that: “Beyond a doubt, then, this note was made for ‘money’, and for a sum certain, because a note for any number of pounds sterling is only another form of expression for the equivalent in dollars”, ignoring altogether the fact that “money of the United Kingdom of Great Britain and Ireland” had been expressly mentioned in this case. Possibly this expression was used only to describe more particularly the kind of pounds sterling to be used in the measure of the sum to be paid rather than as calling for the actual delivery of English coins, but at least it was entitled to consideration.

The foreign decisions are no more satisfactory than our own. In a New Brunswick case³² suit was brought on an instrument made and payable there, calling for “three hundred and seventy-one dollars, with interest, payable in U. S. currency”. This was held to be a good promissory note, but while the court says that “it is said in *Chitty on Bills*, 133, that it is not necessary that the money payable by a note should be current in the place of payment

²⁸ This was technically correct on the pleadings and proof, see note 26.

²⁹ The opinion of the court in *Black v. Ward* goes into this problem at some length, but the instrument involved was payable in the money of the place of payment.

³⁰ (1882) 12 Fed. 478, 8 Sawy. 167.

³¹ *Kearney v. King*, (1819) 2 B. and Ald. 301.

³² *The St. Stephen Branch Railway Co. v. Black*, (1870) 2 Hannay (N. B.) 139.

or where the bill is drawn: it may be the money of any country whatever", and gives a like quotation from Story, the decision seems to rest upon the ground that

"it may be assumed that 'United States currency' means the money of the United States, and that the note is for payment of three hundred and seventy-one dollars of the United States. The Act 58 Geo. III C, 23, mentions the dollars of the United States, and makes them current in this province."

Mr. Justice Fisher had "some doubt whether the note, the subject of this action, from its terms, is a promissory note" because he thought that the acts relating to legal tender and currency did not include the kind of United States money (legal tender notes) denoted by this instrument.

The Canadian courts began by taking a view in accord with that announced in *Thompson v. Sloan*. In *Bettis v. Weller*³³ an instrument made and payable in Toronto calling for "\$200 current funds of the United States of America" was held not a promissory note because its "redemption is restricted to current funds of the United States of America". In *Greenwood v. Foley*³⁴ the instrument sued upon was payable in the United States in a certain number of dollars "American currency". This was held to be a good note because this is the "money of the place of payment". It is to be noticed that the problem here involved is the converse of that at issue in *Bettis v. Weller*, and that the two decisions are consistent and based upon the same rule of law; namely, that where the instrument requires payment in the money of a certain country it is a good note if payable in that country, but not if it is payable elsewhere. But in *Bank v. Cosby*³⁵ the court was hopelessly confused as to the decision of these two cases. The instrument sued upon in the latter case was made in Canada, but payable in the United States in "American currency, to-wit lawful money of the United States". This should have been held a good note, according to the rule announced in the previous cases, because it was payable in the legal tender of the place of payment. But while the court reached this result, it considered that the rules announced in *Bettis v. Weller* and in *Greenwood v. Foley*, were so essentially different that it must overrule one and follow the other. Accordingly it purported to overrule *Bettis v. Weller*, although its decision like that of *Greenwood v. Foley*, is entirely consistent with that of the *Bettis* case. The error of the court in *Bank v. Cosby*, aside from the mis-

³³ (1870) 30 U. C. Q. B. 23.

³⁴ (1872) 22 U. C. C. P. 352.

³⁵ (1878) 43 U. C. Q. B. 58.

understanding of the earlier cases, arose from the mistaken notion that since suit was maintainable on the instrument in Canada it was really payable in Canada in spite of the express stipulation that it was payable in the United States.

So many of the cases rest their opinions on this problem upon the statements of Chitty and of Story, that it is important to observe exactly what these learned writers had to say upon the subject. The wording of the former³⁶ is that

"it is established by foreign as well as English law, that a bill or note must be for the payment of money only . . . but it is said, that it is not necessary that the *money* should be that current in the place of payment, or where the bill is drawn; it may be in the money of any country whatever."

There is nothing in this to tell us definitely whether he is speaking "of the money of any country" in reference to the measure of the obligation or to the medium of payment. But in view of the fact that in actual practice it is more common to measure the sum of the obligation in terms of foreign money, than to require actual delivery of foreign coins, it seems a just inference that if he had intended the latter meaning he would have said so in no uncertain terms. In truth it is altogether doubtful that there was any decided case at the time this book was written³⁷ which involved an instrument in the form of a bill or note that required payment to be by the actual delivery of coins which were "foreign money" in the place of payment.³⁸ Some doubt arises from the statement of Story,³⁹ who although starting with expressions more sweeping than those of Chitty, concludes: "for in all these and the like cases, the sum of money to be paid is fixed by the par of exchange, or the known denomination of the currency, with reference to the par." Were he thinking in terms of medium of payment it is obvious that an instrument calling for the delivery of one thousand English gold sovereigns, for example, would require no further reference to fixing the "sum of money to be paid". Hence such language seems to mean only that the sum to be paid can be measured in terms of the money of any country. But the language

³⁶ CHITTY ON BILLS, 132 and 133.

³⁷ (1799).

³⁸ *Sanger v. Stimpson*, (1811) 8 Mass. 260, seems to be the earliest case of this kind. But while the instrument used the expression "in foreign money" it is quite probable the actual meaning of these words was no different from those of the instrument involved in *Jones v. Fales*, (1808) 4 Mass. 245, in which the promise was to pay in "foreign bills".

³⁹ STORY ON PROMISSORY NOTES, §17.

which follows after that which is quoted seems to indicate that Story may have confused the European law with our own.^{39a}

As a group the cases upon this subject are far from satisfactory. *Black v. Ward*⁴⁰ purports to stand for the rule that a note can be payable "in foreign money", but there was no such issue involved in the case. The court had not the slightest reason to approach this subject more closely than by holding that the word "currency" as there used meant money and that an instrument payable in Canada in "Canada currency" could be sued upon in Michigan. *King v. Hamilton*⁴¹ confuses the use of terms employed to designate the measure of the obligation with those used to specify the medium of payment, and overlooks the real problem involved in the case. It is no authority on the subject of what may be made the medium of payment of a note because, whether rightly or wrongly, it interpreted the wording of the instrument as having reference only to the measurement of the sum payable. The New Brunswick case⁴² held that a note might be there payable in United States currency, but is not an authority for such a rule at common law since it relies upon statutes making the money of this country current in that province. *Bank v. Cosby*⁴³ is on all fours with *Black v. Ward*, and the actual decision is only that an instrument made in Canada and payable in the United States in the money of this country is a good note and will support an action in Canada. Of the cases we have so far discussed two decide squarely that a note may be for the actual payment of money that is foreign to the place of payment. But one of them, *Sanger v. Stimpson*,⁴⁴ disposes of the problem in a single sentence without relying upon either authority or reason; and the other, *Hogue v. Williamson*,⁴⁵ relies upon *Black v. Ward* for what that case purports to hold without observing that the problem is not at all involved in the facts of the case. Two of them hold squarely that the medium of payment of a note cannot

^{39a} Considerable emphasis is placed by Professor Oliphant upon the fact that historically our law of bills and notes goes back to the same source as does the European law upon the subject. But the development of the law has not been the same, for in some of the European countries "notes may be made to order for payment in produce, subject to the same regulations as notes payable in money." See note 48.

⁴⁰ (1873) 27 Mich. 191, 15 Am. Rep. 162.

⁴¹ (1882) 12 Fed. 478, 8 Sawy. 167.

⁴² *St. Stephen Branch Railway v. Black*, 2 Hannay (N. B.) 139.

⁴³ (1878) 43 U. C. Q. B. 58.

⁴⁴ (1811) 8 Mass. 260.

⁴⁵ (1893) 85 Tex. 553, 22 S. W. 580.

be money that is foreign to the place of payment. These are *Thompson v. Sloan* and *Bettis v. Weller*, neither of which rests upon any misinterpretation of either the issue involved or the actual decision of any other case. *Greenwood v. Foley*⁴⁶ involves the same problem as that of *Black v. Ward* and *Bank v. Cosby*, but instead of confusing the issue as was done in those decisions, it analyzes the problem correctly and upholds the instrument for the reason that the money in which it was payable was the legal tender of the place of payment, showing that the theory of the court is in accord with the rule involved in *Thompson v. Sloan* and *Bettis v. Weller*; namely, that if the instrument requires the payment of the coin of a particular country it may be a note if it is payable where that coin is legal tender, but not if payable elsewhere.

This position, moreover, is grounded upon sound reason. If persons in England, for example, enter into agreement to pay money within the United States, they may well measure the obligation in terms of pounds, shillings and pence, such being the terms in which they are accustomed to deal. But if the agreement is to pay money in the United States, it is payable in the legal tender of this country. On the other hand, if their contract is to deliver a certain number of English gold coins in the United States, the promise is not really to pay money, but to deliver what is in this country a commodity. As was said in *Mather v. Kinkie*⁴⁷ of an agreement to pay in this country a certain number of "Spanish coined fine silver pieces of eight", it was "not a contract for money, as our law defines money, but was a contract for a commodity as much so as if it had been wheat, or gold and silver in ingots or bullion."

The promise of a note may specify the particular kind of money to be paid if such is money within the jurisdiction in which payment is to be made, or the instrument may speak in terms of foreign money in determining the measure of the obligation. But if the promise is to deliver coins that are not legal tender where it is payable, the instrument is not a promissory note.⁴⁸

⁴⁶ (1872) 22 U. C. C. P. 352.

⁴⁷ (1866) 1 P. F. Smith (Pa.) 425.

⁴⁸ It may be true that "in Scotland (before 1882) and on the continent, since a bill, in which the sum payable is expressed in a money other than that of the place of payment, either may or must be paid in the foreign money designated", that there "a bill or note of which the designated medium of payment is not the legal tender of the place of payment would be valid." (NORTON ON BILLS AND NOTES [4th ed.], p. 63, note, citing THOMPSON ON

The Negotiable Instruments Law is merely a codification of the law merchant in this respect. It provides⁴⁹ that "the validity and negotiable character of an instrument are not affected by the fact that it . . . designates a particular kind of current money in which payment is to be made." It was said by the court in *McChord v. Ford*⁵⁰ that "the word 'current' preceding the word 'money' cannot change its meaning." Certainly it does not enlarge its meaning. Its only possible effect is restrictive. It still specifies money — not anything which may happen to be current as a substitute for money.

Courts which have held that the word "money" is not in legal significance a synonym of "legal tender" but includes "bank-notes lawfully issued, actually current at par in lieu of coin",⁵¹ might logically extend the rule to include such foreign coins, if any, as are actually by local usage current at par. But as the starting point here is unsound,⁵² this notion is not to be looked upon with great favor. A note is itself a substitute for money and the requirement is that it shall be payable in money and not in whatever may be current as substitutes for money, which is the correct classification for foreign coins that pass freely from hand to hand but are not legal tender.

Mention may be made of the fact that it was at one time suggested that the Negotiable Instruments Law be so amended as expressly to authorize such instruments to be payable in substitutes for money.⁵³ Such a law would permit negotiable bills and

BILLS, p. 254; German Exchange Act, art. 37; STAUB, WECHSELORDNUNG [1899], pp. 103, 19; Commercial Code of France, art. 143; Commercial Code of Spain, art. 494). But it is also true that in some of such countries at least, "notes may be made to order for payment in produce, subject to the same regulations as notes payable in money." (1 RANDOLPH ON COMMERCIAL PAPER, §96, note.) Hence this affords us no assistance in the determination of our own law upon the subject.

⁴⁹ §6 and subd. 5.

⁵⁰ (1826) 3 T. B. Mon. (Ky.) 166, 167.

⁵¹ *Klauber v. Biggerstaff*, (1879) 47 Wis. 551, 557, 3 N. W. 357, 32 Am. Rep. 773.

⁵² See notes 3 and 5.

⁵³ The suggestion was that §6, (5) be amended to read "(5) Is payable in currency or current funds or designates a particular kind of current money in which payment is to be made. The words 'currency', 'current money' or 'current funds' shall mean such circulating media as are legal tender or are lawfully and actually circulating at par with legal tender at the time and place of payment." "Some Necessary Amendments of the Negotiable Instruments Law," by Professor J. B. Brannan, 26 Harv. L. Rev. 493.

notes to be made payable, not only in bank bills, clearing house certificates, and foreign coins circulating at par, but also in gold dust, tobacco, cotton, sugar or any similar commodity and even in the coins and paper issued by private individuals, if in the community such things did actually pass from hand to hand in lieu of money and at par.^{53a} The suggested amendment provides⁵⁴ that the instruments might be payable in such media if they were circulating at par at the time and place of payment. What confusion would result if the particular medium circulated at par when the instrument was made but depreciated before maturity; or if it rose from less than par to par; or if it fluctuated up and down several times during the life of the instrument! The dilemma is that if we require the medium to circulate at par at maturity, the parties do not know when the instrument is made whether it is negotiable or not, while if the time of making is used in the requirement we violate the foundation principle of bills and notes that they must be payable in a sum certain. The fact that sometimes legal tender itself has unfortunately fluctuated in value, is not a sound argument for extending this evil into situations where it can be avoided. It was in the exercise of wisdom, it is suggested, that this amendment was not adopted.

Whatever force and effect it may be deemed wise to give to an instrument promising to deliver in this country a certain number of specified Chinese coins, for example, it should be placed in the same class as a like instrument containing an agreement to deliver wheat or cotton or gold in bullion. Thus the answer to the question involved in the title to this article should be "yes" if we refer to the measure of the obligation only, but "no" if we intend the medium of payment.

Two quite recent cases have seemed to justify a more extensive consideration of this subject than would otherwise be required. They are *Hebblethwaite v. Flint*⁵⁵ and *Brown v. Perera*.⁵⁶ In the first of these cases the Supreme Court of New York was called upon

^{53a} It is suggested by Professor Oliphant that "there has been no contention whether things not common denominators of value are money." If by this he means to exclude such media as gold dust we may well wonder whether an ounce of gold dust is not a common denominator of value among people who think in terms of ounces of gold dust, as much as various foreign coins with which they are less familiar.

⁵⁴ See note 53.

⁵⁵ (1918) 173 N. Y. S. 81, 185 App. Div. 249.

⁵⁶ (1918) 176 N. Y. S. 215 (App. Div.).

to decide whether a demand note made in Brazil was negotiable. The instrument was for the payment of 56 contos of reis Brazilian, "payable at the rate of exchange of $7\frac{1}{2}$ pence per milreis", and was delivered in Brazil and there payable.⁵⁷ The court says:⁵⁸

"It is contended that this note was not negotiable, because payable 'in foreign currency of fluctuating value in the United States'. Our Negotiable Instruments Law (Consol. Laws, c. 38), §25, declares that the negotiable character of such an instrument is not affected by the fact that it '(5) designates a particular kind of current money in which payment is to be made.' Here the note was made in Brazil, payable in its national currency, which was stabilized by a specific rate of exchange into British sterling. It was negotiable by the law merchant. The case of *Thompson v. Sloan*, 23 Wend. 71, 35 Am. Dec. 546, held not negotiable a note given in Buffalo, but payable in Canada money. That cannot apply to notes made abroad, which incidentally come before our courts."

The reference to the Negotiable Instruments Law is unfortunate, because this foreign instrument which only "incidentally" came before the court of New York would not be controlled by that statute. Much worse is the syllabus which says:

"Under Negotiable Instruments Law, §25, subd. 5, declaring negotiability unaffected by designation of particular kind of current money for payment, promissory note made in Brazil, payable in its national currency, stabilized by specific rate of exchange into English sterling, was negotiable."

The fault of this statement is that the only possibility by which this note, made in Brazil, could come "Under Negotiable Instruments Law, §25, subd. 5" would be that it had been expressly made payable in New York, or some other of our States that have adopted this uniform act, hence the assertion is that although made in Brazil and calling for the delivery of its coins in this country it was still negotiable under this statute. This was not the decision. The reference to the law merchant is sound because presumably the laws of the other country "are in accord with the law merchant as recognized in this jurisdiction."⁵⁹ Upon analysis it will be found that this instrument contains, in a round-about manner, a promise measured in terms of English sterling, to pay in Brazil the money of Brazil. The court is entirely sound in holding that this has nothing in common with the rule announced in *Thompson v. Sloan*. The decision amounts only to this: that an instrument which is negotiable where it is made and payable does not lose its negotiable char-

⁵⁷ No other place of payment is mentioned.

⁵⁸ p. 85.

⁵⁹ *Scura v. National City Bank of New York*, (1919) 177 N. Y. S. 75, 79, 107 Misc. Rep. 93.

acter by crossing the boundary line. This position is amply supported by the cases.⁶⁰

But although the decision is unobjectionable, the language, as has been pointed out, is apt to cause confusion. This is even more true of *Brown v. Perera*.⁶¹ A thief stole certain foreign instruments which he transferred to the defendant who took them for value and without notice. After the defendant had disposed of them he was sued by the original owner, and defended the action for conversion on the ground that he had good title. The problem involved is whether the instruments were of such a character that an innocent purchaser from a thief could have a title that would be good against the former owner; and the decision that they were is probably correct. But the opinion is most unsatisfactory.⁶² The facts of the case do not make clear whether these instruments held in their own countries a standing like that of our legal tender notes, or only like that of an ordinary bank bill. But it is quite clear that they were not instruments which were payable in this country, and hence the suggestion that such of them as contained words of negotiability were "within the protection of Negotiable Instruments Law (Consol. Laws, c. 38)" is entirely unsound. None of them were controlled or protected by that New York Statute. Whether or not they were negotiable was a question of the law of the place where they were made and payable. As they were of such nature that the court decides that they were actually "money" there can be no doubt that they were negotiable in their own countries, although our practice would seem to have required evidence of that fact as to those of the instruments which did not contain "words of negotiability". The court assumes that these instruments were such that in their own countries they pass freely from hand to hand by delivery only. If so they were negotiable. A negotiable instrument which is given the legal quality of money does not thereby lose its

⁶⁰ As to instruments made outside the jurisdiction: *Steinhart v. Boker*, (1861) 34 Barb. (N. Y.) 436; *Milne v. Graham*, (1823) 1 B. and C. 192; *Bentley v. Northouse*, (1827) 1 M. & M. 661. As to instruments made within the jurisdiction and transferred without the jurisdiction: *Raphael v. Bank of England*, (1855) 17 C. B. 161; *De La Chaumette v. Bank of England*, (1831) 2 Barn. and Ad. 385.

⁶¹ *Supra*.

⁶² The opinion of Levintritt, referee, was adopted by the court. A very high compliment is paid to this opinion by Professor Oliphant. But see the criticism by Professor Chafee in "Progress of the Law—Bills and Notes," 33 Harvard Law Review, 255, 259.

character of negotiability. It is a negotiable instrument plus. And although the quality of money is one which it would possess only in its own country and in such other countries, if any, as specifically adopt it as a part of their legal tender, its negotiability would not be subject to such limitation, as we have already seen.⁶³ No more than this is necessary for the decision.

But the court deals with the situation in an entirely different manner. It starts with the premise that these instruments are "foreign moneys" and reaches its decision on the ground that foreign money is money in this country. The court admits that foreign money is not legal tender unless made so by statute; and is really contending only that foreign money is of such a nature that one who takes it for value and without notice in due course of trade has a title which is good even though it had been stolen by his transferor. This conclusion could be reached as well by conceding to such foreign coins the quality of substitutes for money,⁶⁴ as by insisting that they are money.^{64a} But the great objection to this opinion is one of the arguments used to prove that foreign money is money. It is stated that a bill or note payable in foreign money is negotiable and "this rule that paper payable in foreign money is negotiable cannot be understood or justified except upon the assumption that the foreign money itself possesses like qualities of negotiability." In the course of this argument the court makes no distinction between money used to measure the sum payable and

⁶³ See the discussion of *Hebblethwaite v. Flint*, *supra*, and note 60. In like manner it is suggested that while foreign money which has not been adopted as a part of our legal tender, is not money in this country; yet, if it does pass in the community as a substitute for money an innocent purchaser from a thief will have good title. This is not a characteristic which is peculiar to money, but is possessed by many substitutes for money. This is true of "bearer" bills or notes, and perhaps of all substitutes for money that do not require an indorsement.

⁶⁴ See note 63.

^{64a} Professor Oliphant's suggestion that money is given a broader definition than legal tender in some of the cases not involving bills and notes, starts with a quotation from *Miller v. Race*, (1758) 1 Burr. 452, 457, in which Lord Mansfield explains why a bank note cannot be traced into the hands of an innocent taker for value. But the same thing is true of any bill or note payable to bearer. Then certain cases are cited in which the question was not the legal definition of money but rather the interpretation of instruments or agreements in which the word "money" had been used. It may be held that persons using this expression in the popular way, intended to include such things as are loosely referred to as "money" without deciding that this is the legal definition of the word.

that called for as the medium of payment. Nor does it mention the fact that where a specific money is required as the medium of payment, the place of payment becomes important. Lastly, it entirely ignores the most famous case upon this point which happens to be one of its own decisions—*Thompson v. Sloan*.

It is not necessary to say that goods in transit or in storage thereby become money, in order to make bills of lading and warehouse receipts negotiable. They are made so by the uniform acts regulating those documents, not by the Negotiable Instruments Law.⁶⁵ In like manner, should the development of international relations become such that it seems desirable to extend the character of negotiability to instruments calling for the delivery of foreign coins in this country, it can be done by appropriate legislation.

In an action upon a promissory note, the plaintiff, if he is successful, receives exactly what was promised—money.⁶⁶ If the action is upon a bill of lading, a warehouse receipt or a promise to deliver foreign coins, he does not receive the property or foreign coins mentioned in the instrument. This distinction is fundamental.⁶⁷

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⁶⁵ "Progress of the Law—Bills and Notes," by Zechariah Chafee, Jr., 33 Harv. L. Rev. 255, 258.

⁶⁶ He received exactly what was promised even if a particular kind of money was promised, such as "United States gold coin". See note 13.

⁶⁷ It is suggested that an instrument containing a promise to pay to the order of a named payee "one hundred dollars in the copper cents of the United States" would not be a negotiable instrument—in fact would not be a note at all. If the promise specifies payment "in specie" or in "United States gold coin" this kind of money is required because of the greater confidence in its stability of value as money. But if ten thousand cents are called for it is clear that the purpose is entirely different. The merchant or banker wants them in his business in the same way that he would want any other commodity, and a breach of such a promise would result in a judgment payable not in cents but in legal tender. Moreover, if the breach of this contract damaged the obligee to an extent greater than one hundred dollars there is no reason why he should not recover damages to be measured in the same way as if the promise had been to deliver grain or cotton. In a money obligation a proper tender is an offer to deliver what is "legal tender" for that amount. But cents are not "legal tender" for any sum above twenty-five cents. (Comp. Stat. of 1916, §6574). The breach of a contract that is solvable in "legal tender" is measured in terms of interest only. This is not true of the breach of any other contracts.

ADDENDUM

The position of Professor Oliphant is that the term "money" as used in the law of bills of exchange and promissory notes should not be limited to legal tender, but should include also "*de facto*" money. The skill with which that able writer has developed his proposition makes out a rather strong case. But it is one with which the present writer is forced to disagree. It is said (p. 617):

"The broader definition of money contended for here does not involve the result that a bill or note payable in negotiable bills or notes would be a commercial instrument. It is true that negotiable bills and notes serve as media of exchange in a broad sense. But the dividing line is to be drawn where convenience dictates."

But until the matter had been settled by judicial decisions there would be great uncertainty as to what convenience would dictate. Nor is it apparent why the dividing line should be drawn by judicial decision rather than by legislative enactment. If our legal tender acts are too narrow would it not be better to amend them than to enlarge our definition of "money" as used in the law of bills and notes? If the dividing line is to exclude all negotiable bills and notes from the media of payment of bills and notes, it will leave out entirely all bank paper. But this is exactly what he does not wish to do, as his contention seems to be that such instruments as are popularly known as "paper money" should be "money" for the purpose of bills and notes. In support of this position he states that (p. 610) "the greater part of our medium of exchange is not legal tender." But this seems to overlook one very important fact. The beginnings of commerce are found in the exchange of goods for goods—the barter era. With the development of media of exchange we come to the time when instead of the exchange of goods for goods it is more common to exchange goods for money and money for goods—the cash era. But today we have advanced beyond this into the credit era; and the greater part of our so-called medium of exchange today consists rather in the written evidences of credit than in money. But the credit system is still founded upon money. A owes B who owes C who is in debt to A. Perhaps the whole series of transactions may be settled without the actual transfer of any money, but each creditor could insist upon money if he so desired, just as the owner of goods could refuse to exchange them for anything but goods. And just as money is valuable because it can be used for the purchase of goods, so credit is sound as long as it can be reduced to money. But if bank notes, for example, are to

be given the quality of money, the only sound method will be by satisfying ourselves that they are adequately secured and having them made legal tender by statute.

The fact that money is more ancient than "legal tender acts" amounts only to this:—that for convenience the tenderability of minor coins has been limited to certain amounts, and certain evidences of credit (legal tender notes) have been added to the category of money. The facts of life today are such that we cannot well go back to the more simple methods that were sufficient for earlier conditions; if changes are necessary we must go forward. We have, wisely it is thought, given to these evidences of credit a stronger position than that of mere choses in action. It may be that the time is at hand when we should place some of them on a still higher footing. But to permit certain of them, without specifying which, to become the media of payment of bills and notes without making them legal tender would involve the most serious difficulties. Corporations or individuals might issue cash notes, unsecured or not adequately secured, which might nevertheless actually circulate at par in fields varying from small communities to the entire nation. Would any of these be the proper media of payment of bills and notes? If so, which would not? Enlargements upon this illustration are not necessary. The argument of Professor Oliphant would seem to point to the fact that the time is approaching when bank paper should be added to the field of legal tender rather than to the position for which he contends.

As to foreign money two possibilities exist. If it is desirable that any foreign coins should be made legal tender in this country, that argument should be presented to Congress. Or it may be found wise to extend to instruments which call for the delivery of foreign coins certain characteristics of commercial paper without giving them the full benefit of the Negotiable Instruments Law, just as was done in regard to bills of lading and warehouse receipts.

R. M. P.

ENFORCEMENT OF A FOREIGN EQUITABLE DECREE

A husband and wife were residents of the State of Washington. A court of that State, having both parties before it, and authority to decide divorce cases and to allocate the property of the parties, granted a decree of divorce to the wife, ordered the husband to make certain money payments as alimony and costs, and further ordered him to convey to the wife certain land in Iowa. This he failed to do, and instead left Washington and came to Iowa where he transferred the land, for a nominal consideration, to a grantee with full notice of the premises. The former wife as plaintiff then brought an action in equity here in Iowa, joining the former husband and his grantee as defendants, praying that the deed be set aside, and that the court require the former husband to convey the land to the plaintiff, or on his failing to convey, appoint a commissioner to do so. The lower court granted the relief prayed for, and the judgment and decree were affirmed on appeal.¹

The interesting legal question presented, the extra-territorial effect of an equitable decree, has been the subject of much able discussion by learned writers.² It has also been the subject of sharply

¹ *Matson v. Matson*, 173 N. W. 127. (Iowa Sup. Ct.) The statement of the case in the report does not show clearly the full extent of the relief the plaintiff secured. The appellant's abstract shows the decree of the lower court ordered the property to be conveyed to Mrs. Matson.

² "Equitable Decree as a Cause of Action in Another State," 21 Harv. L. Rev. 210; "Extra-Territorial Extent of a State's Jurisdiction in Personam," 21 *ibid.* 354; "The Extra-Territorial Force of a Decree by a Court of Equity," 23 *ibid.* 390; "Equitable Decree as a Cause of Action in Another State," 25 *ibid.* 653; "The Extra-Territorial Force of a Decree by a Court of Equity," 31 *ibid.* 646; Willard Barbour, "The Extra-Territorial Effect of the Equitable Decree," 17 Mich. L. Rev. 527; W. W. Cook, "The Powers of Courts of Equity," 15 Col. L. Rev. 37, 106, 228; "Full Faith and Credit . . . respecting Decrees affecting Real Property in other States," 70 Cent. L. J. 1; H. W. Schofield, "Equity Jurisdiction under Faith and Credit Clause," 5 Ill. L. Rev. 1. Commenting on *Matson v. Matson*, see 29 Yale L. Jour. 119 and 18 Mich. L. Rev. 142.

The doctrine of *Matson v. Matson* is adversely criticised by Dean Roscoe Pound in his discussion of "Progress of the Law-Equity," 33 Harv. L. Rev. 420, 423, 424 (Jan. 1920). His points will be set out in the course of this discussion.

The present writer adds little to the able exposition of Professor Barbour, cited above. That article appeared before *Matson v. Matson* was decided, and

conflicting opinions among various courts and among the individual judges of appellate tribunals before whom the question has been raised. Decisions presenting exactly the same set of facts as those above set forth are not numerous, though many may be found involving other aspects of the extra-territorial effect of an equitable decree.

It would seem pretty clear that the result of the Iowa decision is a good one to have reached, if it is in accord with legal principles. There is little to urge on behalf of the defendant. He had his day in court, personally and by counsel of his own choosing, with full opportunity to be heard on the questions decided adversely to him. As Judge Preston says in his opinion, the defendant committed a fraud on the Washington court and a fraud on the wife. Ought he to profit by his wrong because he was clever enough to get out of Washington before he could be compelled to do what justice required? But it is a truism that hard cases make bad law. Did the court depart from settled principles in ordering the conveyance of Iowa land, following the Washington decree?

NO PERSONAL SERVICE IN FIRST ACTION

In discussing the general question we may dismiss at the outset cases where the court makes an order concerning foreign land without having a non-resident defendant before it, either by personal service within the jurisdiction, or his appearance. Such was the Illinois case of *Proctor v. Proctor*³ where a wife domiciled in Illinois brought an action there against her husband for divorce, seeking also alimony and solicitor's fees. The husband was served in Ohio, where he resided, and he failed to answer. A decree of divorce was granted, and the court awarded to the wife a one-third interest in certain Ohio real estate belonging to the husband. He brought proceedings in error, and secured a reversal. The result seems clear. The Illinois court could properly grant a divorce,⁴ but a personal judgment against a non-resident, not served within the territory, is clearly of no effect,⁵ and while the statutes may and

it seemed worth doing to re-state Mr. Barbour's thesis, with particular application to the Iowa case, especially as it is believed that comparatively few Iowa lawyers would have had their attention called to Mr. Barbour's paper.

³ 215 Ill. 275, 74 N. E. 145. See accord, cases 69 L. R. A. 673, note to this decision.

⁴ *Ditson v. Ditson*, 4 R. I. 87.

⁵ *Buchanan v. Rucker*, 9 East 192; *Pennoyer v. Neff*, 95 U. S. 714. That a decree for alimony rendered against a nonresident on constructive service is of

generally have authorized courts of equity to act *in rem* in certain cases, with regard to land within the state,⁶ this court had neither the person nor the *res*. It is equally clear that the decree could have been assailed successfully if attacked collaterally.⁷ Cases involving such a situation were cited to the Iowa court and very properly distinguished from *Matson v. Matson*.

PERSONAL ENFORCEMENT OF FOREIGN DECREE

Turning again to the original proposition, is there reason for denying relief to the plaintiff who asks equity to compel a defendant personally before it to perform what a foreign equity court, having jurisdiction over his person, has ordered him to do? There is authority which seems flatly to deny relief in such a situation.⁸

Bullock v. Bullock is the leading case and probably contains the best statement of the plaintiff's difficulties. It seems squarely in point on the facts. Mrs. Bullock sued her husband in New York for a divorce; the husband was personally served and appeared. She was granted a divorce and awarded alimony payable in monthly installments and it was further ordered that Bullock execute and deliver to her a mortgage of certain New Jersey land, as security for payment of such alimony. Bullock left New York without executing the mortgage. Mrs. Bullock, in an action brought against Bullock in New Jersey, prayed for an order that the defendant execute the mortgage as ordered in the New York decree. Relief was denied her by a divided court, the deciding vote being cast by Garrison, J., who concurred in the result upon grounds of his own.

One theory of the plaintiff's case was that she had, by virtue of the New York decree, acquired an equitable lien on the New Jersey land. This theory, Magie, J., said could not "be sustained without a disastrous violation of fundamental principles", and the dissenters agreed. New York could not directly affect New Jersey land. The further argument for the plaintiff appears to have been put as well as it is possible to phrase it,

"that the decree and order of the supreme court of New York imposed upon no validity, see notes, 59 L. R. A. 178; 50 L. R. A. 583, 584; 9 L. R. A. (N. S.) 593; L. R. A. 1917 F 1161.

⁶ *Arndt v. Griggs*, 134 U. S. 316; *HOUSTON, THE ENFORCEMENT OF DECREES IN EQUITY*, Ch. II.

⁷ *Rodgers v. Rodgers*, 56 Kan. 483, 43 Pac. 779.

⁸ *Bullock v. Bullock*, 52 N. J. Eq. 561, 30 Atl. 676; *Fall v. Fall*, 75 Neb. 104, 113 N. W. 175, and continued as *Fall v. Eastin*, 215 U. S. 1, 30 Sup. Ct. 3.

the respondent a personal obligation to do what the decree and order had directed him to do, and that a court of equity in New Jersey ought to compel him to perform that obligation as it would compel him to perform his contract to convey or mortgage lands in its jurisdiction."

The learned judge met the issue squarely. He gave two reasons why the plaintiff's argument could not prevail. "It is a misuse of terms to call the burden thereby imposed on respondent a personal obligation. At the most, the decree and order imposed a duty on him, which duty he owed to the court making them." Second, "The establishment of the contrary doctrine would result in practically depriving a state of that exclusive control over immovable property therein which has always been accorded it." The concurring opinion, admitting that a judgment of a sister State was conclusive under the full faith and credit clause, took the position that this order for the mortgage was not part of the judgment, but was an order "ancillary to the execution and did not possess any element of a judgment upon the issue submitted to the court for decision, which was whether the marriage . . . should be dissolved."

ALIMONY AS ANCILLARY TO JUDGMENT

Let us notice the last point first. It has met with some approval.⁹ If the order for the conveyance really does not possess any elements of a judgment, but is only ancillary, New Jersey would properly say that it is not concerned with it. It is fundamental that matters of procedure are determined by the forum, and a litigant cannot complain that the remedies where he brings his action are not as efficacious as those available at the place where his right arose. The order requiring a husband to furnish security for alimony payments is provided for in the New York Code of Civil Procedure and has only recently¹⁰ been made to apply to decrees of other States as well.¹¹ Can it then be said that the decree for this mortgage, like the provisions in the New York Statute for bond, sequestration, receiver and injunction are "in the nature of execution and not of judgment, and could have no extra-territorial operation"?¹²

The soundness of such an explanation has been doubted.¹³ The

⁹ 3 Beale, *Cases on Conflict of Laws*, 537.

¹⁰ Since the case of *Lynde v. Lynde*, 162 N. Y. 405, 56 N. E. 979. Affirmed, 181 U. S. 183, 21 Sup. Ct. 555.

¹¹ *Moore v. Moore*, 208 N. Y. 97, 101 N. E. 711.

¹² Gray, J., in *Lynde v. Lynde*, 181 U. S. 183, 21 Sup. Ct. 555.

¹³ See Prof. Barbour in 17 Mich. L. Rev. 535 note.

New York decree (1) declared the marriage dissolved; (2) ordered Bullock to pay certain money; (3) ordered him to execute a conveyance. Why say, as does the learned judge, that "the sentence of law upon the record" ceases with (2) ?

In *Matson v. Matson*, the New Jersey and Nebraska decisions were distinguished on that point: however, it might be under different statutes, where it is said that the subject of the action was only the matrimonial status and the rest only a decretal order, under the laws of Iowa, the wife has an interest in the real property of her husband, and the division of the property is also the subject matter of the action, though its main purpose may be the securing of a divorce. Recognition of a wife's inchoate dower as an interest in the realty of her husband may be found in several Iowa cases.¹⁴ The reasoning of the Iowa court shows the correctness of its result. But it does not make that of New Jersey correct, and should the latter be rejected, the distinction drawn would not be necessary. Obviously no criticism is implied because the court distinguished, instead of disapproved, the result reached by the tribunal of a sister State. Finally on this point, the explanation of *Bullock v. Bullock* would not apply where, as in the Iowa case, the order for conveyance was not for the purpose of furnishing security for the payment of money, but to give the wife a free and clear title to certain property for her own.

DECREE AS CREATING DUTY TO COURT ONLY

So we are back on the two points relied upon by the other judges in *Bullock v. Bullock*. Did the decree create a binding obligation, or only a "duty to the court" pronouncing it? It seems to the writer that this argument is deprived of all its force by the great mass of authority allowing, without question, an action on a foreign decree for the payment of money. In the very State which decided *Bullock v. Bullock*, Mrs. Bullock could and did sue Bullock and recover for unpaid alimony.¹⁵ The equitable decree for money has

¹⁴ *Buzick v. Busick*, 44 Iowa 259, 262; *Dunlap v. Thomas*, 69 Iowa 358, 28 N. W. 637; holding that while such inchoate dower cannot be disannexed from the real estate and sold as a separate dower interest, (*McKee v. Reynolds*, 26 Iowa 578) yet, when the property is sold to a purchaser the doweress at the same time may make a separate contract with him for the sale of her inchoate interest; *Warner v. Norwegian Cemetery Association*, 139 Iowa 115, 117 N. W. 39, "The dower right, given by statute to a wife in the property of her husband, . . . is in the nature of a property right, and she cannot be divested of it by any act of her husband. . . ."

¹⁵ *Bullock v. Bullock*, 57 N. J. L. 508, 31 Atl. 1024.

been recognized as a cause of action in another State in this country since 1805.¹⁶ Indeed it has been held that an action to recover alimony ordered by the court of another State cannot be brought in equity because the remedy at law is complete and adequate.¹⁷ While there is some conflict as to recovery in cases of orders for alimony,¹⁸ this arises not because the court goes into the purpose for which the order was given, but because it is often made subject to modification.¹⁹ If the accrued alimony is not subject to modification, it can be recovered in another State, and the plaintiff's claim is protected by the full faith and credit clause.²⁰

Is there then a difference between a decree ordering payment of money and a decree for doing any other act, so that the latter creates only a duty to the court ordering the decree? Professor Barbour has stated the answer admirably.²¹

"There appears to be no sensible reason for this distinction. The decree assumes substantially the same form whether it be for the payment of money or the conveyance of land; it is *formally* but an order to the defendant to do an act, which may be the payment of \$1000 or the execution of a deed to Blackacre. Likewise in the matter of enforcement, aside from statutory innovations, the method is the same in both types of decrees. Any argument drawn from the form of the decree or the means by which it is enforced applies equally to the decree for money."

We may leave this first argument in support of *Bullock v. Bullock* with another statement, also borrowed from the same writer.

"When a judge . . . today declares that a foreign decree ordering the conveyance of land creates no obligation but merely a duty owed by the defendant to the court, he is assuming that equity has made no progress since the time of Coke."

¹⁶ *Post v. Neafie*, 3 Caines (N. Y.) 22. See FREEMAN ON JUDGMENTS, 4th ed., §434; discussion and authorities cited by Professor Cook, 15 Col. L. Rev. 237-242. See the broad language used in *Pennington v. Gibson*, 16 How. 65, 77, 14 L. Ed. 847, 852.

¹⁷ *Bennett v. Bennett*, 63 N. J. Eq. 306, 49 Atl. 501; *Davis v. Davis*, (App. D. C.) 9 L. R. A. (N. S.) 1071. In *Barber v. Barber*, 21 How. 582, 16 L. Ed. 226, the plaintiff recovered in an action in equity brought in a federal court in Wisconsin, the order having been rendered by the court of another State.

¹⁸ The weight of authority is said to allow recovery. See 59 L. R. A. 178 note.

¹⁹ See notes, 9 L. R. A. (N. S.) 1168, 28 L. R. A. (N. S.) 1068.

²⁰ *Sistare v. Sistare*, 218 U. S. 1, 30 S. C. 682, 28 L. R. A. (N. S.) 1068; WHARTON ON THE CONFLICT OF LAWS, 3rd ed., §239c.

²¹ 17 Mich. L. Rev. 543. See pp. 539 to 547 of this article for an excellent discussion of this point. For a thorough discussion of the development of the dignity of an equitable decree to the judgment of a court of record, see second and third installments of Professor Cook's articles, cited in note 2.

FOREIGN INTERFERENCE WITH LOCAL LAND

Is the second reason of more weight? Would forcing a defendant to convey the land in accordance with the order of a foreign court interfere with the undoubted control which each State exercises of real property within its borders? In the exercise of this control a State could, no doubt, insist that its land could not be directly or indirectly affected by an act done anywhere else, that a transfer of the land could be accomplished only by a feoffment on the land. But ever since the historic decisions of *Penn v. Lord Baltimore*²² and *Massie v. Watts*²³ courts of equity having the parties before them, have been ordering defendants to make conveyances of foreign land when the conveyance could be made without leaving the jurisdiction.²⁴ Chief Justice Marshall said this power would be exercised in cases of "fraud, trust or contract", by which it was meant that the facts must be such as to present a case of proper equitable cognizance,²⁵ in order that the first court should make the order for the conveyance. Of course a plaintiff must show facts presenting a proper case for the exercise of equity's power. Such a conveyance, executed under the pressure of the foreign court's order, is recognized as valid at the situs.²⁶ Further the grantor can get no help at the situs from the fact that he made the conveyance under compulsion. Such was the situation of an Iowa land owner, who had been ordered to convey Iowa land by a Kentucky court, and who upon his refusal, was lodged in jail, where he soon had a change of heart. The conveyance stood.²⁷ And the Nebraska court, in the very case in which it refused relief to a plaintiff with an unobeyed decree for conveyance of Nebraska land, made against a defendant by a Washington court, cordially approves this decision.²⁸

When the defendant, unable to escape from the first State, is coerced into making his conveyance, that coercion process is surely having its effect on foreign land. This has been judicially recog-

²² 1 Ves. Sr., 444.

²³ 6 Cranch (U. S.) 148.

²⁴ For collections of the innumerable authorities on this point, see 69 L. R. A. 673 note; 23 L. R. A. (N. S.) 924 note; 27 L. R. A. (N. S.) 420 note.

²⁵ WHARTON, *CONFLICT OF LAWS*, 3rd ed., §289a; 69 L. R. A. on 975.

²⁶ *Steele v. Bryant*, 132 Ky. 569, 116 S. W. 755.

²⁷ *Gilliland v. Inabit*, 92 Iowa 46, 60 N. W. 211.

²⁸ *Fall v. Fall*, 75 Neb. on p. 128.

nized.²⁹ It is hard to see how foreign interference with domestic land is increased if the foreign court is unsuccessful in compelling obedience to its order. "Coercion would seem but an incidental thing, and its success, the consequence of conscience or cowardice, another incidental thing."³⁰ If one finds comfort in the assurance that what really affects the title is the conveyance made pursuant to the order, and not the order itself,³¹ can it not with equal truth be said that the decree of the court at the situs is what affects the title to the land, and there is no foreign interference at all? The first decree created a personal obligation on the defendant. The court at the situs is willing to enforce foreign-imposed personal obligations, does so every day in cases of torts, contracts, judgments. If in the enforcement of that obligation local land changes hands, there is no cause for alarm.

An attempt has been made to reconcile cases here by saying that if the foreign decree affecting the domestic land was issued upon an antecedent obligation, then the court at the situs will recognize and enforce it, but not otherwise.³² To this four answers can be made. The cases make no such distinction. The second suit is not to enforce the original obligation, but the foreign decree. No such inquiry is made in the enforcement of foreign equitable decrees which order the defendant to pay money. And finally, even if the point were valid, it would not apply to an order in a divorce case because a decree for alimony is one for the enforcement of a pre-existing obligation. "The judgment for alimony does not create a new obligation or duty in . . . respect [to the obligation to support]. It but determines the extent of the existing obligation, and regulates the manner of its performance."³³ There is nothing in this point that should prevent a plaintiff from securing, at the

²⁹ See Brewer, J., in *Dull v. Blackman*, 169 U. S. 243, 18 S. C. 333; "if all the parties interested in the land were brought personally before a court of another state, its decree would be conclusive upon them and thus in effect determine the title". See also *White v. Warren*, 214 Mass. 204, 100 N. E. 1103.

³⁰ 70 Cent. L. J. 2, commenting on *Fall v. Eastin*.

³¹ *Davis v. Headley*, 22 N. J. Eq. 115; *Wilson v. Braden*, 48 W. Va. 196, 36 S. E. 367; *Carpenter v. Strange*, 141 U. S. 87; WHARTON, CONFLICT OF LAWS, §289a.

³² 21 Harv. L. Rev. 210. But see 25 Harv. L. Rev. 654. Professor Cook evidently thinks this is as far as the authorities go, though he does not defend the limitation. See 15 Col. L. R. 245, 246.

³³ Reed, J., in *Martin v. Martin*, 65 Iowa 255, 21 N. W. 595. See for similar language, Gray, J., in *Audubon v. Shufeldt*, 181 U. S. 575, 21 S. C. 735.

situs, enforcement of a foreign equitable decree for conveyance of land.³⁴

PROCEDURAL DIFFICULTIES

A further reason for refusing to enforce an equitable decree made by the court of another jurisdiction has been offered by our foremost authority on the subject of Conflict of Laws, Professor Joseph H. Beale. He says:³⁵

"An equitable decree for the doing of an act, except the mere payment of money, is not by our law enforceable in another court, even of the same State; there is no form of proceeding for enforcing the merely personal decree of a court of equity, except by order of the court rendering it. It is therefore impossible to enforce a foreign decree that an act be done by the defendant, such as making a conveyance, either by decreeing the conveyance without judicial investigation or by regarding it as made."

If there is no machinery provided by the *lex fori* which will allow the plaintiff to get what is due him under foreign law, that is compelling reason for denying him help. He can hardly ask to have the local legal apparatus made over for his benefit, neither should his opponent be subjected to a more onerous obligation than the one originally imposed. This sort of situation has presented itself in the cases.³⁶ If giving effect to a foreign decree ordering the conveyance of land would create a revolution in local methods of administering justice our plaintiff will have to get her alimony in some other way.

That the foreign decree for the doing of an act is refused enforcement only for lack of a way of doing it, is a reason which would reconcile some of the cases otherwise conflicting. Compare, for instance, the leading cases of *Bullock v. Bullock*,³⁷ already dis-

³⁴ Dean Pound makes this argument against allowing relief, however. See discussion cited, note 2. He says: ". . . . If we are to allow a court of equity in New York to create duties to convey New Jersey land, today when a duty to convey land, specifically enforceable in equity, in effect, and very generally in theory involves an equitable ownership the result is to allow one state through its courts to create real rights in land in another state". Of course a plaintiff may secure a decree for conveyance of land without having an interest therein by the law of the situs, if he shows proper cause to a court having a defendant before it. See discussion and cases cited by Professor Beale, 20 Harv. L. Rev. on 384 and 385. There is no necessary relation between such a decree and equitable ownership.

³⁵ From the Summary in 3 Beale's Cases on Conflict of Laws, p. 537.

³⁶ *Slater v. Mex. Nat. R. Co.*, 194 U. S. 120, 24 Sup. Ct. 581.

³⁷ 52 N. J. Eq. 561; 30 Atl. 676.

cussed, with *Burnley v. Stevenson*.³⁸ Mrs. Bullock was asking affirmative action, basing the claims against defendant on the obligation created by the New York decree. In *Burnley v. Stevenson*, no affirmative help was asked. A having agreed to convey certain Ohio land to B, had died before doing so. B joined the heirs of A in an action brought in Kentucky and got a decree ordering them to make the conveyance, in default of which a master was appointed to make, and did make it. Successors to the heirs of B brought in Ohio an action against A's successor, and he set up the Ohio decree as an equitable defense which was permitted under the local procedure, and won out. It was recognized that the deed of the master appointed by the Kentucky court conveyed no Ohio land.³⁹ But the decree itself, the court thought, "must be regarded as conclusive of all the rights and equities which were adjudicated and settled therein. . . ." It should be remarked that the court in *Burnley v. Stevenson* was not consciously establishing a distinction between the foreign decree as a defense and a cause of action. Indeed the learned judge's statements as to the effect of a decree as conclusive of all rights was in terms applied to both situations.

If the objection to the enforcing of the foreign decree for the doing of an act is only that there is no form of proceeding for doing it, a statute providing new machinery is all that is necessary.⁴⁰ But what new form of relief is the plaintiff seeking that she needs a statute to provide for it? If there is no court which like the equity court, can order the defendant to do an act, there obviously would be no help for the plaintiff. And of course she cannot induce the Iowa court to cite the defendant for contempt for not obeying the Washington decree, any more than she could have execution on Iowa goods under the Washington judgment for a money sum. Sometime either of those things may be possible if Congress exerts its full power under the "full faith and credit" clause,⁴¹ but it would admitted-

³⁸ 24 Ohio St. 474. See also *McCune v. Goodwillie*, 204 Mo. 306, 102 S. W. 997, decree in Ohio affecting Missouri land cannot directly act on the land, but is conclusive as to rights of the parties before the court rendering the decree.

³⁹ The suggestion has been made that apart from legal precedent there is little difference between recognizing the validity of a deed executed under compulsion by the foreign equity court, and one executed in the party's name by a commissioner appointed by such court. See W. W. Cook, 15 Col. L. Rev. on pp. 128, 129.

⁴⁰ "In the nature of things there would be no difficulty in enforcement if authorized by statute," says a note-writer in 25 Harv. L. Rev. on p. 654, following Prof. Beale's view.

⁴¹ See the interesting discussion of this question, and comparison with the

ly take legislation to accomplish it. But all our plaintiff is asking of the local equity court is the kind of an order the court gives every day, one commanding the defendant to execute a deed. She offers the foreign decree as conclusive of her right and defendant's obligation.⁴² Surely here is no strain on local machinery of justice that must be relieved by statutory enactment.

The point about lack of procedure to enforce a domestic decree, apart from action by the court rendering it, deserves a word more. An action to enforce an equitable decree in the same jurisdiction where rendered is a rare thing. In most cases there would be no reason for doing so. As Professor Cook has pointed out,⁴³ there was no time limitation for the enforcement of a decree such as the year and a day limitation applicable to common law judgments. So ordinarily there would be no occasion for a further action, either in case of a decree ordering the payment of money, or the doing of an act. But if occasion for such action did present itself, the plaintiff could avail himself of a bill to execute the decree, "a bill assuming as its basis the principle of the decree, and seeking merely to carry it into effect."⁴⁴ Under modern statutes, there would seem no occasion to ask another court in the same State for help in enforcing an equitable decree. In Iowa, for example, all judgments or orders for the payment of money, or delivery of the possession of property, are enforced by execution in any county the plaintiff may direct. Obedience to those requiring the performance of any other act is to be coerced by attachment as for a contempt.⁴⁵

Courts which will enforce a foreign decree for the doing of an act whether some "antecedent obligation has been violated by the de-

Australian system by Prof. W. W. Cook, "The Powers of Congress under the Full Faith and Credit Clause", 28 Yale L. Journal 421.

⁴² The court in *Matson v. Matson* states the contention well. "[The plaintiff's] claim is that the Washington court having complete jurisdiction, and having rendered judgment and decree, she may use that as a basis for another suit in the courts of this state, after personal notice, for judgment here, and for a decree here to carry out and enforce the Washington decree, which the defendant, by removing himself from the state of Washington, prevented the Washington court enforcing the decree in that state."

⁴³ 15 Col. L. Rev. 235, 236. See also p. 243 of his discussion.

⁴⁴ ADAMS' EQUITY, 8th ed., pp. 414, 415. See also discussion cited in the preceding note. In *Fletcher v. Ferrell*, 9 Dana (Ky.) 372, 380, Ewing, J., says, "Had the decree there, [Tenn.] been rendered in Kentucky, it is abundantly established that an original bill would lie to carry out and enforce it."

⁴⁵ Iowa Code, §§3954, 3955.

fendant''⁴⁶ or not,⁴⁷ or where he has been ordered to convey land as alimony⁴⁸ seem not to be troubled by lack of adequate procedure to give the decree effect.

NECESSITY OF ALLOWING ACTION ON DECREE

Dean Pound makes the further objection to the *Matson v. Matson* doctrine that the relief granted is not necessary to an adequate protection of the plaintiff's rights.⁴⁹ He says: "The right to alimony exists independently of and anterior to the decree. It may be asserted as such where the land lies, and a decree may be had there either awarding the land or money which can be made from the land."

It is true that a wife may, in Iowa, bring an equitable action for separate maintenance against a husband, if she has cause for divorce, and secure an order for separate support even though she seeks no divorce decree.⁵⁰ And this is generally allowed.⁵¹ It should be remembered, however, that in some instances the result has been brought about by statute, and that at one time the preponderance of authority, following English decisions limited by ecclesiastical court precedents, denied this power to equity.⁵²

This does not touch the question affecting the rights of the wife already divorced. May she bring an action for alimony subsequently, independently of her decree for it? Suppose the divorce decree awarded no alimony. Our Supreme Court has said that where a decree of divorce was silent as to alimony, it could not be

⁴⁶ *Dunlap v. Byers*, 110 Mich. 109, 67 N. W. 1067; *Fletcher v. Ferrell*, 9 Dana (Ky.) 372 (relief refused on other grounds). The view finds expression in *Burnley v. Stevenson*, *supra*, and *Vaught v. Meador*, 99 Va. 569, 39 S. E. 225.

⁴⁷ *Robins v. Long*, 60 How. Pr. (N. Y.) 200. Professor Cook, who seems to think that authority has only carried the enforcement of a foreign equitable decree to the point of giving a new decree based on the former one when the obligation out of which it arose was based on contract, express trust or other consensual relationship, cites this case as an example. 15 Col. L. Rev. 244, 245. It should be noticed that the basis on which the foreign decree was rendered did not appear, nor was it inquired into. The case seems a direct authority for a much broader proposition.

⁴⁸ *Matson v. Matson*, note 1; *Mallette v. Scheerer*, 164 Wis. 415, 160 N. W. 182.

⁴⁹ See 33 Harv. L. Rev., 423-425.

⁵⁰ *Graves v. Graves*, 36 Iowa 310; *Whitcomb v. Whitcomb*, 46 Iowa 437; *Farber v. Farber*, 64 Iowa 362, 20 N. W. 472; *Platner v. Platner*, 66 Iowa 378, 23 N. W. 764; *Shors v. Shors*, 133 Iowa 22, 110 N. W. 16.

⁵¹ See collection of authorities, 1 R. C. L. 879.

⁵² See notes, 77 Am. St. Rep. 228; 60 Am. Dec. 666; 12 Am. Dec. 251.

allowed subsequently, even upon a showing of changed circumstances, and this, too, where there was a statutory provision allowing subsequent changes in an order for maintenance.⁵³ Failure to award alimony is an adjudication against the wife's right. The marriage itself is dissolved, the parties are no longer husband and wife and no duty to support now exists. Then would it not appear that Mrs. Matson must base her entire claim upon rights given by the decree for alimony? In the situation just mentioned, both parties were before the court giving the divorce.

Take a harder case. Husband secures a divorce in the State of his domicile after service on the defendant by publication only. Granting the divorce is valid, can the wife afterwards secure alimony? Authorities are divided but there is respectable backing for the holding that she cannot, on two grounds; the marriage is dissolved and there is no longer a duty to support; second, since the foreign court could have ordered a conveyance of local land or made other provision for alimony, the matter must be considered *res judicata*.⁵⁴ It may be that this rule is too harsh, that the first action being one *in rem*, should not bar a personal action for alimony,⁵⁵ but our plaintiff would have a poor chance of getting alimony in a State where this rule exists, unless she can depend on the original decree.⁵⁶

Should not the decree of the court having both parties before it settle the question of alimony for good and all, so that neither party can re-litigate it, there or anywhere else? Does it not only settle the obligation of defendant, but the limits of the obligation, too, on well settled principles of *res judicata*? At common law a debt sued

⁵³ *Spain v. Spain*, 177 Iowa 249, 158 N. W. 529; commented upon, 2 Iowa Law Bulletin 204. Earlier Iowa decisions are discussed in the case and in the comment.

⁵⁴ See cases collected in notes, 59 L. R. A. 180; 34 *ibid.* (N. S.) 1106; *ibid.* 1915 E. 421. The only Iowa case mentioned in this connection is *Van Orsdal v. Van Orsdal*, 67 Iowa 35, 24 N. W. 579, where the court conceded the possibility of the subsequent action but said that at all events, it would be limited to property held by the husband at the time of the divorce.

⁵⁵ 10 Col. L. Rev. 555.

⁵⁶ The case *Dean Pound* cites as authority for the right to alimony independent of the decree is *Cochran v. Cochran*, 42 Neb. 612, 60 N. W. 942. It was overruled by *Eldred v. Eldred*, 62 Neb. 613, 87 N. W. 340. In *Bodie v. Bates*, 95 Neb. 757, 146 N. W. 1002, the court said *Cochran v. Cochran* was right and overruled *Eldred v. Eldred*. But judgment in this case was reversed by the Supreme Court of the United States as a violation of the full faith and credit clause. *Bates v. Bodie*, 245 U. S. 520, 38 Sup. Ct. 182.

upon was merged in the judgment. And Dean Pound concedes that equitable decrees for the payment of money are now on the same basis as money judgments since under modern statutes they may be enforced by execution. Then he says: "But in equity the suit is to compel defendant to do his duty, and that duty is not necessarily merged in the decree, so that if the decree fails of effect, an action may still be brought upon plaintiff's legal right if he has one."

What was before the Washington court in *Matson v. Matson* in addition to the plaintiff's claim for divorce? Obviously, her claim against him for a division of the property. The court, having all the facts, adjudicated this, in a decree which defined Matson's duty in regard to it, both as to its existence, and the limit to which he should be called upon to furnish such support. Is the matter any the less definitely settled by the decree whether Matson was ordered to convey land, than when he was ordered to pay a certain sum of money? If the court, taking into consideration all the circumstances of the parties, had made an order for a definite sum of money to be paid plaintiff, she could not subsequently get more; by the same reasoning, defendant could not be allowed to claim he should pay less. An order for more made by another court would be a violation of the full faith and credit provision of the Constitution.⁵⁷

It has been hard to find cases raising the precise question of whether a decree for doing an act merges the cause of action in the decree. The result is clear when the order is that the defendant pay money. A recent Massachusetts case holds that where a plaintiff had secured a decree ordering a defendant to discharge a mortgage, which had been paid, he could not afterwards sue for damages for the refusal under a statute making the mortgagee liable in tort for damages caused by such refusal.⁵⁸ It is said that "the doctrine

⁵⁷ *Bates v. Bodie, supra*. The learned reader will note that the opinion was delivered by the same justice who delivered the majority opinion in *Fall v. Eastin*. McKenna, J., said: "Whether . . . the right to [alimony] should be litigated in the suit for divorce, or may be sought subsequently in another, the principle is applicable that what is once adjudged cannot be tried again. And this court has established a test of the thing adjudged and the extent of its estoppel. It is: If the second action is upon the same claim or demand as that in which the judgment pleaded was rendered, the judgment is an absolute bar not only of what was decided but of what might have been decided."

⁵⁸ *Fitzgerald v. Heady*, 225 Mass. 75, 113 N. E. 844.

of merger arises out of the quality which renders the judgment conclusive upon the parties as to the question which is involved."⁵⁹

The doctrine of *res judicata*, "that a cause of action once finally determined, without appeal, between the parties, on the merits, by any competent tribunal, cannot afterwards be litigated by new proceedings either before the same or any other tribunal",⁶⁰ is applicable as fully to final decrees in equity as to judgments at law, and by no means limited to those ordering payment of money.⁶¹ Then is not our plaintiff limited to a claim to enforce the decree?

AUTHORITIES

There is good authority for saying that a duty to convey land imposed by a decree of a court in one State will be enforced by another, when the second court is at the situs of the land. A recent Wisconsin case is on all fours with the Iowa decision.⁶² Decisions and dicta in divorce cases and others are to the same effect.⁶³

The conspicuous cases for the opposing view are *Bullock v. Bullock* and *Fall v. Fall*⁶⁴ with further consideration in the Supreme Court as *Fall v. Eastin*, the latter holding that the refusal of the Nebraska court to quiet title in the plaintiff as against the disobedient defendant and his grantee, was not a denial of full faith

⁵⁹ *Mutual Life Ins. Co. v. Newton*, 50 N. J. L. 571, 577, 14 Atl. 756.

⁶⁰ Foster, J., in *Foster v. The Richard Busteed*, 100 Mass. 409, 412; quoted in *Mutual Life Ins. Co. v. Newton*, *supra*.

⁶¹ *Brown v. Fletcher*, 105 C. C. A. 425, 182 Fed. 963; *Strang v. Moog*, 72 Ala. 460; *Peay v. Duncan*, 20 Ark. 85; *Denver v. Lobenstein*, 3 Colo. 216; *Meyer v. Meyer*, 40 Ill. App. 94; *Bigelow v. Winsor*, 1 Gray 299; *Mutual Life Ins. Co. v. Newton*, *supra*; *Babcock v. Camp*, 12 Ohio St. 11; *Pratt v. Ratliff*, 10 Okla. 168, 61 Pac. 523; *Kelsey v. Murphy*, 26 Pa. St. 78; *Gallagher v. Moundville*, 84 W. Va. 730, 12 S. E. 859; BLACK ON JUDGMENTS, §720. See, for a full discussion, W. W. Cook in 15 Col. L. Rev. pp. 228 *et seq.*

⁶² *Mallette v. Scheerer*, 164 Wis. 415, 160 N. W. 182.

⁶³ *Page v. McKee*, 3 Bush (Ky.) 135, 96 Am. Dec. 201; *Dunlap v. Byers*, 110 Mich. 109, 67 N. W. 1067; *McCune v. Goodwillie*, 204 Mo. 306, 102 S. W. 997; *Roblin v. Long*, 60 How. Pr. (N. Y.) 200; *Burnley v. Stevenson*, 24 Ohio St. 474; *Williams v. Williams*, (Ore.) 162 Pac. 834; *Cheever v. Wilson*, 9 Wall. 108, 19 L. Ed. 604.

⁶⁴ Recognition of a foreign decree for conveyance was refused in an Illinois decision of *Courtney v. Henry*, 114 Ill. App. 635, through fear of foreign administration of domestic land.

An interesting set of facts was raised in *De Graffenried v. De Graffenried*, 132 N. Y. Supp. 1107; *affd.* in 204 N. Y. 667, 98 N. E. 1118. The statement of the case is from 25 Harv. L. Rev. 653. "A Swiss court granted a divorce to a wife. Swiss law, on a decree of divorce against the husband, requires

and credit. A difference between the Iowa case and these cases has already been discussed.⁶⁵

Further distinguishing *Fall v. Fall*, the Iowa court emphasizes: (1) That in that litigation the defendant was not personally served in the second suit;⁶⁶ (2) That the Nebraska court in that case took the position that it was not authorized to divide real estate of the parties in a divorce proceeding. It is true that Fall was not served with notice in Nebraska in the litigation there, but his grantee with notice was. And "if the decree in the first suit fixed upon the husband an obligation to convey the land and his grantee took with notice of this obligation, a court of equity acquiring jurisdiction of the grantee should compel him to convey in fulfillment of that obligation, even though it fails to acquire jurisdiction of the husband."⁶⁷

Conflict with the subsequent decision in *Fall v. Eastin* might conceivably be avoided on this ground, however. The only point necessary to the decision there was whether the full faith and credit clause had been violated. Mr. Justice Holmes, concurring in the decision that it had not, said in his opinion the Washington decree was entitled to full faith and credit in Nebraska.

"But the Nebraska court carefully avoids saying that the decree would not be binding . . . had the husband been before the court. . . . Now if the court saw fit to deny the effect of a judgment upon privies in title, or if it considered the defendant an innocent purchaser, I do not see what we have to do with its decision, however wrong. . . . Still less do I see how a mistake as to notice could give us jurisdiction."

The majority opinion is not so clear. It stresses the point that if one seeks a decree directly affecting a *res*, not the person of a defendant, the suit must be brought where the *res* is. This may be granted. One could well differ from the learned judge, however, in considering, as he seemed to do, that the plaintiff's claim for relief against Fall or his purchaser with notice, depended upon

him to reconvey property which the wife has transferred to him during the marriage. The wife in New York sought a reconveyance of such property, situated in New York. The court dismissed the bill." It is not clear whether the husband had been ordered expressly to convey, aside from the provision in the law. Probably not. The able dissent of Scott, J., is a good statement of the view that the decree created an enforceable obligation.

⁶⁵ *Supra*, p. 234.

⁶⁶ On this, see *infra*, p. 246.

⁶⁷ E. N. Durfee, 18 Mich. L. Rev. 142, 143, Dec. 1919.

treating the Washington decree as creating an interest in Nebraska land.

Is it a real distinction that Nebraska courts do not have authority to make a division of the real property of the parties on granting divorce and Iowa courts do? It is well to keep in mind that in neither *Fall v. Fall* nor in *Matson v. Matson* was the second court asked to make such a division, but was asked to enforce a decree ordering a conveyance which would effect such a division, made by a court which did have such authority. On fundamental principles of Conflict of Laws, enforcement of a foreign acquired right should not be refused, merely because the law of the forum, in a similar case, would not give the plaintiff a similar right. To deny relief on the ground that local policy would be infringed by helping the plaintiff, "it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens."⁶⁸

Furthermore, aside from general principles of Conflict of Laws, the Supreme Court of the United States has held, that under the full faith and credit clause, that the court where a judgment is sought to be enforced is not to go back of the judgment into the merits of the original cause of action.⁶⁹

It is believed, therefore, that despite the distinctions carefully drawn by the Iowa court, *Matson v. Matson* is in substantial conflict with both the Nebraska and New Jersey decisions. It seems to go the whole way in supporting the thesis advanced by Mr. Barbour in the admirable discussion previously referred to:⁷⁰

"If the defendant is personally before a court of equity, the court has power to order him to convey foreign land. Such a decree is an effective judgment and determines conclusively his obligation to convey and this obligation remains binding upon the person of the defendant wherever found. Such a decree ought to be entitled to full faith and credit at the situs of the land. . . ."

SECOND SUIT ONE IN REM

An interesting question would be raised if the facts of *Matson v.*

⁶⁸ Mitchell, J., in *Herrick v. M. & St. L. Ry. Co.*, 31 Minn. 11, a tort case, but the principle is applicable here. See WHARTON ON THE CONFLICT OF LAWS, 3rd ed., §4 a, and discussion commenting on the point, 18 Mich. L. Rev. 142, 143, and 144.

⁶⁹ *Fauntleroy v. Lum*, 210 U. S. 230, 28 Sup. Ct. 641, 52 L. Ed. 1039.

⁷⁰ 17 Mich. L. Rev. at 532, 533.

Matson be varied a little. Suppose the defendant, though personally before the court in the Washington suit when the order that he convey the Iowa land was given, was not personally served in Iowa when the action to compel him to obey the order was brought. If that action took the form of a bill to compel him to convey, a personal decree being prayed for, obviously it would be necessary to have the defendant there, and if the second action were not in the State where the land lay, nothing could be done unless appearance by the defendant could be induced or compelled. But suppose an action to quiet title should be brought by the plaintiff at the situs of the land, the foreign decree being depended upon to establish the plaintiff's right to it? This suit may properly be considered, nowadays at least, an action *in rem*,⁷¹ indeed since it may now generally be brought upon notice by publication to nonresident defendants, it is difficult to see how it could be called anything else. The set of facts supposed came before the Supreme Court of Nebraska in the hard fought case of *Fall v. Fall*, and the decision was adverse to the plaintiff.⁷² The court, however, though mentioning, did not rely upon the fact that the defendant was not then before the court. Stress was laid on the fact that the defendant, after the first decree, had conveyed to a third party, whom the decree did not bind. The broader question of *Fall v. Fall*, the effect of such a decree as was there sought to be enforced, has been considered. If it is established that the first order, directing the defendant to convey to the plaintiff, is conclusive as to the plaintiff's rights and the defendant's obligation, should it not be equally conclusive in the second State, whether the plaintiff now seeks a personal order against the defendant that he convey or a decree quieting his title? For the second court to give such a decree quieting title would not mean that the foreign decree itself operated to affect the title to local land, but that it was conclusive upon the plaintiff's right and defendant's obligation. Now the plaintiff seeks enforcement of his opponent's obligation with regard to the land, directly against the property itself. He should be able to do this if he could have relief against the defendant personally. The writer has found no case, except *Fall v. Fall*, presenting these facts,^{72a} and the suggestion will

⁷¹ HOUSTON, ENFORCEMENT OF DECREES IN EQUITY, Ch. 2.

⁷² Discussed *supra*.

^{72a} It has been held that under a status authorizing appointment of a trustee to convey land in an action for specific performance where defendants are non-residents, the proceeding is *in rem*, and notice by publication is sufficient.

have to stand without authority, for what it is worth. The point was not involved in *Matson v. Matson*, and this fact, with commendable caution, was observed by the court.

There is authority, however, on a set of facts that looks, on first thought, to be the same as those just supposed. Suppose a court having plaintiff and defendant before it,⁷³ makes a decree purporting to settle land in another State upon the plaintiff. Can the plaintiff claim rights under the decree in the second State? It is clear that the land itself is not directly affected. And no duty was imposed on the defendant by the decree, for he was not ordered to do anything whatever. So it has been held the decree is ineffective for any purpose.⁷⁴

The practical application of such cases is that if a plaintiff wants a decree settling rights in land itself, he had better bring his action at the situs. Modern statutes will enable him to do this, even in the absence of the adverse claimant. If this is not possible and it would not be in many cases of divorce litigation, a personal order against the defendant is the best that can be obtained. If not obeyed the plaintiff will stand a fair chance of securing its enforcement elsewhere.

HERBERT F. GOODRICH

COLLEGE OF LAW
STATE UNIVERSITY OF IOWA

Hollander v. Central etc. Co., 109 Md. 181, 71 Atl. 442, annotated in 23 L. R. A. (N. S.) 1135. In such a case the duty to convey is created by the contract. But if the first decree also creates a duty to plaintiff, the legal situation is the same as in the hypothetical case.

⁷³ If the defendant has not been personally brought before the court, it has jurisdiction over neither the person nor the thing, and the decree is worthless. *Wilson v. Braden*, 48 W. Va. 196, 36 S. E. 367.

⁷⁴ *Burton-Lingo Co. v. Patton*, (N. M.) 107 Pac. 679, 27 L. R. A. (N. S.) 420; *Sharp v. Sharp*, (Okla.) 166 Pac. 175, L. R. A. 1917 F 562. See *Williams v. Williams*, (Ore.) 162 Pac. 834; *Carpenter v. Strange*, 141 U. S. 87.

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THE PROPOSED CONCILIATION LAW.—The Bulletin is glad to give space to the following comments on the proposed conciliation law discussed in the last number, by Mr. Powell, until recently of the Council Bluffs bar, and Judge Moffit of the District Court of the 18th District.

Dear Sir:—I have just read with much interest your article in the Iowa Law Bulletin on "A Conciliation Law for Iowa". Several readings of the bill, with arguments therefor, fail to convince me that such a law is needed or is in fact desirable.

Iowa has a comparatively simple system of courts, consisting of the Justice, the District and the Supreme Courts. In addition to this splendid system there has been grafted on the Superior and Municipal Courts with a limited jurisdiction; the District and Superior Courts are clothed with certain powers constituting the Juvenile Courts, and we also have the Mayor's and Police Courts. In addition to the foregoing we also have the Committee of Arbitration (§2477-m-27) and the Board of Railroad Commissioners (§2139) where complaints are investigated and adjudicated. It would thus seem that there is an abundance of machinery for administering the substantive law, and that any addition to this system, making it more complex, would have to have very strong arguments in its favor, and that a real pressing need existed for creating it.

The chief argument in favor of the proposed bill appears to be to lessen the expense to the litigants, which is a most desirable end. But there is no assurance that this would be accomplished and the litigants cannot be compelled to submit their causes to a conciliator. If all litigants were equally desirous of having their cause submitted to a conciliator, or if both parties were of equal ability to handle and present their cause such a plan might be of considerable value, but it is a matter of common knowledge that where parties are sufficiently desirous of settling their disputes they rarely get into court; and that as a rule a very large number of the smaller actions are among parties who are of very unequal ability and station in life, usually a well-to-do creditor suing a hard-pressed

debtor. It is obvious that one of the parties is going to avoid any and all courts or conciliators for as long a time as possible. And then, after the matter is placed before a conciliator one party will oftentimes be handicapped in presenting his side of the case. The latter situation is often the case when the litigants are represented by counsel, but as a rule they are more equally matched than otherwise.

The greatest objection, however, appears to be the lack of uniformity in the procedure. Each District Court judge is given the authority to establish the rules in his court and there is no reason to believe that these will be the same in any district in the State.

Cannot the lessening of the expense to the litigants be obtained by a much more simple method than by adding to our court machinery and making our procedure really more complicated than it now is? One method, it is believed, would be to increase the jurisdiction of our Justice Courts, but as this would require a constitutional amendment it is out of the question in a discussion of the proposed bill.

A second suggestion would be to try all actions involving less than \$50.00 informally by the justice, without the payment of the usual fees, and in a manner similar to that provided by the proposed bill, the Justice of the Peace acting as a conciliator. It would seem that this would meet any requirement which the proposed bill is supposed to meet.

A third suggestion would be to simplify the proceedings in actions involving less than \$500.00 by trying all actions to the court unless a jury was specifically demanded by either of the parties, and by permitting the court to act as a conciliator.

The writer believes that three essentials are especially desirable in our judiciary, *viz.*, a simple but adequate system of courts, uniform and simple procedure, and a speedy determination of the causes submitted. The experience of some other States with their multiplicity of courts and quasi-judicial bodies, their technical and voluminous systems of procedure, and their futile attempts to correct the same, shows that these essentials are not easily or successfully obtained. It is therefore believed that the present system, with very slight changes in the procedure, is adequate for all conditions to be found in this State, and that the creation of additional means to administer justice is not needed or desirable.

Very truly yours,

CLIFFORD POWELL.

MARYVILLE, MO.

Dear Sir:—

Since I have been greatly interested in the establishment of the proposed conciliation scheme from the time it was first suggested and am still overwhelmingly convinced of its desirability, I am especially anxious to answer Mr. Powell's criticisms of the measure.

Mr. Powell is surely right in saying that additions which make

existing judicial machinery more complex will have a strong presumption against them. It may be that we have too many bodies of limited jurisdiction already, although the special procedure in rate complaints, (Code §2139) arbitration provisions under the Workmen's Compensation Act, (Code Supp. §2477m 27) and in industrial disputes, (Code Supp. §2477 N *et seq.*) have ample justification for their existence. The chapter of the Code providing rules for arbitration of all claims (§4385 *et seq.*) has a useful purpose but is altogether too elaborate and expensive a process for the kind of claims conciliation is primarily intended to care for. But it is important to note that the conciliation bill does not add a new court. It only gives additional powers to courts already in existence, district and municipal courts.

Mr. Powell does not think decreased expenses to litigants is assured by the conciliation measure. It will be assured if the judges operating it make the rules simple. There will be no expensive serving of process, no filing fees, no copy fees, no jury fees, and most important, no counsel fees. Litigants *can* be compelled to submit their cases to a conciliator because the proposed statute says so in Section Three. They do not have to accept his decision, but the figures show that they do accept it in a majority of cases where conciliation courts are in operation. Any handicap that one party may be under in not being able to present his side of the case convincingly is overcome by the judge, whose business is not to give a decision on the case as the parties develop it but to get them together in a friendly informal way and draw out from each side his story of the dispute. And this is the way it does actually work out. Here is one of a number of interesting incidents described by Dean Vance in reporting the operations of the Minneapolis Court (taken from the discussion in 2 Minn. L. Rev. 491, 497):

"The plaintiff, a well dressed and rather kindly looking man, was suing the defendant for \$48.00 unpaid rent. The defendant explained that he had been ill for three months, that he had not yet fully recovered his strength and that he had gotten behind with all of his bills and he didn't see how he could pay the plaintiff's house rent. When questioned by the judge as to whether he had a job, he replied in discouraged tones that he wasn't strong enough to do heavy work, that the pay for light work was very small and that it wouldn't be much use anyhow as his wages would be garnisheed. The judge then proceeded to encourage him to get the best kind of job he could and to pay off his debts gradually. He told him that he ought to pay the plaintiff, and that he would see that the plaintiff gave him as much time as was necessary. The defendant said he thought he could pay \$10 a month if he wasn't pushed. The judge, however, told him he thought he had better not undertake to pay more than \$8 a month and that he would enter judgment for the \$48, payable at the rate of \$8 per month. The plaintiff, who evidently did not enjoy the appearance of being an oppressor of the poor, readily assented to this arrangement."

Mr. Powell's greatest objection is want of uniformity of procedure in the various districts. If the conciliation process involved technical rules this would be very important. But the whole object is to get away from technical rules. All the conciliation rules in a given district ought to be read and understood in five minutes. From their nature and the object to be attained they will have elements of uniformity—as much as district court rules for instance. The provision allowing each judge to make his own rules was incorporated to allow those interested in this thing to mark out what seemed best in operation without having their hands tied in the doing of it.

Of Mr. Powell's substitutes, the third could be adopted without affecting the conciliation scheme. It has much to be said for it, except that an existing statute (Code §3733) permits trial to the court whenever the parties will agree thereto. I do not believe that making the Justices of the Peace conciliators will help us much. Theirs is a political office, not a high one at that. They would lose their fees in conciliation actions, and could hardly be expected to be enthusiastic about such a scheme. Many of the justices would not be qualified to act as conciliators. Conciliation, especially at first, must be carefully worked out by those in sympathy with its objects, if it is going to succeed.

We have a chance here to take a fine step forward, a chance to strengthen the administration of justice where it is now weakest, in petty causes. Yet such causes are about the only kind that touch the average citizen. It is by our success or failure there that he will judge the value of our legal institutions. It is important for us to convince him at this time, when law and government are under fire, that he can get justice under the law, that he gets not alone equality in legal rights, but equality in administration of justice to protect his rights. In my opinion the proposed conciliation measure by giving quick and inexpensive justice will help do this.

Very truly,

JOHN T. MOFFIT.

TIPTON, IOWA
MAY 10, 1920

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Sworn to and subscribed before me this 31st day of March, 1920, by HERBERT F. GOODRICH, Editor.

DELLA A. GRIEHL,

Notary Public in and for Johnson County, Iowa.

(My commission expires June 30, 1921.)

NOTES

BEQUESTS FOR THE CELEBRATION OF MASSES.—Testamentary bequests for the celebration of masses are by no means uncommon, and such bequests have raised many interesting problems. When Henry VIII. quarreled with the Church of Rome and assumed the headship of the Church of England, he appropriated the property of the monastic houses through the kingdom as a part of his scheme of aggrandizement. In addition to this, he induced Parliament to enact the statute of 23 Hen. VIII, under which (Ch. 10) uses and trusts declared in lands and hereditaments for the procuring of masses, or for the support of Catholic worship, or for like purposes, were made void. Subsequently in the first year of the reign of his son, Edward VI., another and similar statute (1 Edw. VI., ch. 14) was passed declaring void such gifts of either land or personal property.¹ Previous to this time, however, such gifts had been held valid. Text-writers cite two old wills, one bearing the date of July 1, 1523, and making bequests to priests for the saying of prayers, and the other bearing date of January 17, 1524, and making bequests to priests for the burning of tapers, which were held valid by the English Court.² Though both of these wills were made during the reign of Henry VIII, they provide for bequests of personalty and were not affected by the statute passed during his reign. All such gifts were affected by the statute passed during the time of Edward VI., and the English courts in interpreting this statute, held such bequests and devises invalid, and developed a doctrine which is commonly known as that of "superstitious uses".³ In 1832, the Roman Catholics in England were given the same rights as the Protestant dissenters,⁴ but the English courts still refused to recognize such bequests and devises,⁵ and it was only last year that the House of Lords repudiated the doctrine of "superstitious uses" and held a bequest for the celebration of masses to be valid.⁶

It has been held that, because of our constitutional guarantees of religious liberties, the doctrine of "superstitious uses" has no place in American jurisprudence.⁷ In the majority of cases, the

¹ UNDERHILL ON WILLS, §837; 11 CORPUS JURIS, 322; 5 BULING CASE LAW, 328.

² *In re Kavanaugh's Estate*, 143 Wis. 90, 126 N. W. 672, 28 L. R. A. (N. S.) 470, citing the "LAW OF CHARITABLE USES, REVISED AND MUCH ENLARGED; WITH MANY CASES IN LAW BOTH ANCIENT AND MODERN," printed in 1676 under censorship of Francis North, at pages 41, and 35, respectively.

³ UNDERHILL ON WILLS, §813.

⁴ 2 & 3 Wm. IV, ch. 115.

⁵ 5 R. C. L. 328; *West v. Shuttleworth*, 2 Myl. & K. 684; *Heath v. Chapman*, 2 Drew. 417; *In re Blundell's Trusts*, 30 Beav. 360; 14 Annotated Cases 1026.

⁶ *Bourne v. Keane*, 121 Law Times 426, 68 University of Pa. L. Rev. 299; XXXVI, The Law Quarterly Review, No. 141, p. 53.

⁷ *Harrison v. Brophy*, 59 Kan. 1, 51 Pac. 883, 40 L. R. A. 721; *Webster v. Sughrow*, 69 N. H. 380, 45 Atl. 139, 48 L. R. A. 100; *Holland v. Alcock*, 108

American courts have held such bequests valid, but have done so upon different theories: (1) that the gift is absolute to the beneficiary named with a request that it be used for a specified legal purpose; (2) that a valid charitable trust has been created; or (3) that such bequest is valid as a private trust.⁸

Although the Iowa court has previously passed on this question the recent case of *Wilmes v. Tierney*,⁹ in which the testator directed his executors to sell a certain piece of land and "expend the proceeds for masses for the benefit of himself and his deceased wife", has again brought the question up for consideration. The court seems to refuse the doctrine of charitable trusts and bases its decision, sustaining the bequest, upon an earlier decision which held such a bequest to be valid as a private trust.¹⁰ A brief examination of some of the leading cases involving this question will illustrate the application of the three above mentioned theories and enable us to select the proper theory upon which to sustain this type of bequest.

Gifts may be made to a beneficiary under a will, and the making of certain requests or suggestions as to the use of such bequeathed property will not prevent the bequest from being an absolute one. In a much cited Rhode Island case,¹¹ the will gave \$100 to the parish priest "to say masses for me" and the court said that

"the gift for masses is valid, as one which takes effect at once, like any personal bequest for a legal object. It is evidently not intended to be a trust, as it is for the parish priest himself, for his own services in saying masses. A gift to one for a mourning ring would not be a trust, and this is the same principle. In each case the testator would seek a posthumous benefit,—a memorial of his personality in one case, and a benefit to his soul in the other. In both cases the substance of the gift would go to the legatee and one is not a trustee for himself."

A leading California case, decided under a statute making such bequests void if charitable trusts, held that a bequest to a bishop to be expended in saying masses was not a charitable trust, but merely a gift to the bishop for a legal object.¹² An early Wisconsin decision, however, in which the bequest was made to the priest to be used for masses for the soul of the testator and others, held that such could not be construed as a bequest to the priest, and allowed the bequest to fall entirely.¹³ Wisconsin later adopted the trust

N. Y. 312, 16 N. E. 305, 2 Am. S. R. 420; *Sherman v. Baker*, 20 R. I. 446, 40 Atl. 11, 40 L. R. A. 717; *In re Kavanaugh's Estate*, *supra*; *In re Lennon's Estate*, 152 Cal. 327, 92 Pac. 870, 125 Am. St. Rep. 58.

⁸ *Sherman v. Baker*, 20 R. I. 446, 40 Atl. 11; *Festorazzi v. St. Joseph's Church*, 104 Ala. 327, 18 So. 394, 25 L. R. A. 360; 14 Ann. Cas. 1025; 6 Virginia L. Rev. 294.

⁹ 174 N. W. 271. (Iowa Sup. Ct.)

¹⁰ *Moran v. Moran*, 104 Iowa 216, 73 N. W. 617, 39 L. R. A. 204, 65 Am. St. Rep. 443.

¹¹ *Sherman v. Baker*, *supra*.

¹² *In re Lennon's Estate*, *supra*.

¹³ *McHugh v. McCole*, 97 Wis. 166, 72 N. W. 631, 40 L. R. A. 724.

theory.¹⁴ In a recent Minnesota case we have a bequest made to an Elder of the Church "to be used by him for the extension of the Kingdom of God, . . ." in his own church, and in construing this provision with other clauses of the will in which absolute gifts had been made, the court held that such was not a mere gift to the Elder.¹⁵ If we accept the theory that such bequests are absolute gifts to the beneficiaries named and that the testator's directions are mere precatory words, the validity of such bequests becomes more or less a question of interpretation. The objection to this theory is that the legatee can use the bequest for any purpose and thus defeat the intent and wishes of the testator. It would only seem natural that the courts would be most lenient in cases of bequests made directly to a priest or parish, for there can be little doubt but that such legatees will carry out the wishes of the deceased. And the intent of the testator should be carried out providing it can be done without contravening established legal principles.

Many jurisdictions sustain such bequests on the ground that they are charitable trusts. A charitable trust has been defined as

"a gift for the benefit of an indefinite number of persons, either by bringing their hearts and minds under the influence of education or religion, by relieving their bodies of disease, suffering, or constraint, by assisting to establish themselves for life, by erecting or maintaining public buildings, or in other ways lessening the burdens of making better the condition of the general public, indefinite as to names and numbers. In short, it is a gift to a general public use."¹⁶

Charitable trusts are highly favored by the law and a very liberal construction will be adopted in order to render them effectual.¹⁷ In the light of the above definition, can we say that a bequest for the celebration of masses should be held valid as such a trust? One court has held such a gift to a priest to be valid as one *causa mortis*.¹⁸ This is another illustration of the court's desire to carry out the wishes of the deceased. The courts which hold such bequests to be valid public trusts do so upon the theory that they are for the general promotion of religion and not for the sole benefit of the deceased testator. One court has said that a "mass" is

"an act of public worship, in the celebration of the Eucharist as observed in the Roman Catholic Church and formerly in the Church of England and yet observed in some Anglican Churches. It is common and public to all, as a religious ceremony and is therefore a religious or pious use, and is a public

¹⁴ *In re Kavanaugh's Estate*, *supra*.

¹⁵ *In re Ford's Estate*, 175 N. W. 913. (Minn. Sup. Ct.) The court relies upon previous decisions which interpret the Minnesota statute as prohibiting charitable trusts.

¹⁶ *In re Lennon's Estate*, *supra*.

¹⁷ *Fay v. Howe*, 136 Cal. 599, 69 Pac. 423; *In re Willey's Estate*, 128 Cal. 1, 60 Pac. 471; *Hagen v. Sacrisson*, 19 N. D. 160, 123 N. W. 518; *In re Creighton's Estate*, 60 Neb. 796, 84 N. W. 273, 83 Am. St. Rep. 553; *Beidler v. Dehner*, 178 Iowa 1338, 161 N. W. 32; *Wilson v. Bank*, 164 Iowa 402, 409, 145 N. W. 948; *In re Estate of Johnson*, 141 Iowa 109, 119 N. W. 275.

¹⁸ *Gilmore v. Lee*, 237 Ill. 402, 86 N. E. 568, 127 Am. St. Rep. 330.

charity, as distinguished from a private charity which it might be if restricted to masses for souls of designated persons."¹⁹

Another leading case says that by doctrines of the Catholic Church, the whole church profits by every mass, "since the prayers of the mass include all of the faithful, living and dead".²⁰ Since this attitude is taken by the Roman Catholic Church with reference to masses, there seems no reason why the court should refuse to enforce such gifts as charitable trusts for the promotion of religion and benefiting of the members of the Roman Catholic faith. The enforcement of this type of trusts should not be difficult for the courts will never allow trusts to be defeated because of a refusal to perform on the part of the trustee or failure to appoint such a trustee.²¹ Likewise the heirs of the testator will not be content to see the trustee profit by a non-performance of the conditions of the trust, and will ordinarily make application to have such property turned over to them, thereby informing the court of the non-performance and giving the court an opportunity to compel a compliance with the provisions of the trust.

The Iowa court sustains this type of bequest and thus reaches the correct result. In the case of *Moran v. Moran*,²² in which there was a provision to the effect that "I will and bequeath to the Catholic priest who may be pastor of the Beaver Catholic Church, when this will shall be executed, \$300, that masses may be said for me", our court refused to consider this bequest as a charitable trust, but held it valid as a private trust. In order to have a valid private trust we must have a designated *cestui que trust*.²³ Certainly the deceased cannot be the beneficiary. Thus the trust should fail if it is of a private nature, but it is clear that the Iowa court is attempting to secure the proper result, irrespective of legal theory. The *Moran* case might possibly be sustained on the theory of an absolute bequest to the beneficiary named. The recent case of *Wilmes v. Tierney* is more doubtful upon this theory since the bequest is to the executor and not to a priest or parish. Both cases can be sustained on the theory of charitable trusts, and undoubtedly the decisions are influenced by the doctrine of charitable trusts, which is recognized in Iowa, but has never been directly applied to a bequest for the celebration of masses.²⁴

¹⁹ *Ackermann v. Fichter*, 179 Ind. 392, 101 N. E. 493, 46 L. R. A. (N. S.) 221, Ann. Cas. 1915 D. 1117.

²⁰ *In re Kavanaugh's Estate*, *supra*.

²¹ *Klumpert v. Vrieland*, 142 Iowa 434, 439, 121 N. W. 34; *Grant v. Saunders*, 121 Iowa 80, 95 N. W. 411; 5 AM. & ENG. ENCY. OF LAW, 920; 14 L. R. A. (N. S.) 109.

²² *Supra*.

²³ PERRY ON TRUSTS AND TRUSTEES, §13; UNDERHILL, TRUSTS AND TRUSTEES, Art. 1, p. 1; Prof. John C. Gray, 15 Harv. L. Rev. 509; *Wallace v. Wainwright*, 87 Pa. St. 263.

²⁴ *Johnson v. Mayne*, 4 Iowa 180; *Seda v. Hubla*, 75 Iowa 429, 39 N. W. 685; *Phillips v. Harrow*, 93 Iowa 92, 61 N. W. 434; *In re Cleven's Estate*, 161 Iowa 289, 142 N. W. 986; *Wilson v. Bank*, 164 Iowa 402, 145 N. W. 948.

WHAT CONSTITUTES DELIVERY OF A BILL OR NOTE.—The recent case of *Herron v. Brinton*¹ again brought up before the Iowa court the question of the validity of a conditional delivery of a note, and incidentally raised the kindred topic as to the requisites for a valid delivery of a negotiable instrument. The plaintiff brought suit to recover on a note executed by the defendant payable to the former's ward. The maker contended that the money had been advanced as a gift for the purpose of enabling him to build a home and that the note was executed simply to secure payment of interest to the payee during his life time. The plaintiff objected to any evidence on this point on the grounds that it varied the terms of a written instrument but the court held that the evidence was admissible under Code Supp. §3060a 16, providing that as between the parties the delivery of a negotiable instrument may be shown to have been conditional.

Prior to the passage of the Negotiable Instruments Law there was some doubt as to whether the delivery of a note could be shown to have been conditional,² but the general rule was well settled that parol evidence to the effect that the note was to become binding only on the happening of a condition did not vary the terms of a written instrument for the reason that if there were no valid delivery, no obligation existed.³ The Negotiable Instruments Law simply codified what was the rule before and the above case is clearly right.⁴

It should be noted, however, that the rule is different in the case of deeds. A deed may not be delivered in escrow, according to the weight of authority, to the grantee. The grantor may not show that the delivery was conditional only, and the deed in the hands of the grantee will be enforced according to its original terms.⁵

A more difficult question is as to what acts will be sufficient for an unconditional delivery of a bill or note. Of course this will only arise in controversies between the original parties or their assignees who are not bona fide purchasers, because the statute provides a conclusive presumption of delivery of a note in the hands of a holder in due course.⁶ But in all other cases, the uniform law makes actual delivery a requisite for the validity of the instrument, and the courts have said that the essence of delivery is the intention of the maker that it become binding, expressed by some act.⁷ What acts, then, are necessary to show this intention?

The courts have gone very far in supporting delivery in the case

¹ 175 N. W. 631 (Iowa Sup. Ct.).

² *Campbell v. Jones*, 52 Ark. 493, 12 S. W. 1016; *Henshaw v. Dutton*, 59 Mo. 139.

³ *McCormick Harvesting Co. v. Morlan*, 121 Iowa 451, 96 N. W. 976.

⁴ Code Supp., §3060a 16; *Ball v. James*, 176 Iowa 647, 158 N. W. 684.

⁵ *Dorr v. Middleburg*, 65 W. Va. 778, 65 S. E. 97; *Walker v. Warner*, 31 App. D. C. 76.

⁶ Code Supp., §3060a 16.

⁷ *Irwin v. Deming*, 142 Iowa 299, 120 N. W. 645; *Purviance v. Jones*, 120 Ind. 162, 21 N. E. 1099.

of deeds. No jurisdiction would require a manual delivery.⁸ Delivery to a third party with intent that the deed become effective is clearly sufficient,⁹ and delivery to a recorder for purposes of recording only, raises a strong presumption of the required intent.¹⁰ The courts have even held that the instrument need not leave the actual physical control of the grantor at all, and his physical power to destroy is not conclusive providing that his intention that it be effective and no power to revoke is expressed.¹¹ The Iowa court has held that the mere words of the grantor to the effect that he intends the deed to be binding is sufficient evidence of his intention;¹² and in a recent Iowa decision, it was indicated by way of dictum, that even the fact that the grantor retained power to revoke would not invalidate the deed if the power was never exercised.¹³ This, of course, is not in harmony with the weight of opinion.¹⁴

It is evident that in the above class of cases there is a strong tendency to minimize the requirements for delivery in order that the intention of the grantor be not defeated by failure to perform what the courts have considered technical or formal acts. Will the law go as far in the case of negotiable instruments? Many cases have considered the delivery of deeds and delivery of negotiable instruments as one and the same problem.¹⁵ The rule of law is clearly the same:—that there must be some act clearly indicating an intention that the instrument take effect at the time the act is done, and the same question remains as to what acts are sufficient. The most difficult problem arises in the case of bills and notes, as in deeds, where the maker has retained physical control over the instrument, at the same time expressing an intent to be bound. Suppose, for instance, a note is executed in the presence of the payee, the maker laying it on the desk at the same time indicating that he considers the transaction completed. Then both parties are called suddenly from the room and the note never gets into the hands of the payee. Is it his note?

It has generally been agreed that where the maker has been acting as agent for the payee, retention of control will not be conclusive against delivery, and where his intention to be bound has been shown, as by indorsements on the note, there is sufficient deliv-

⁸ *Weber v. Christen*, 121 Ill. 91, 11 N. E. 893; *Newton v. Bealer*, 41 Iowa 334, 338.

⁹ *Hall v. Cardell*, 111 Iowa 206, 82 N. W. 503; *Williams v. Kidd*, 170 Cal. 631, 151 Pac. 1.

¹⁰ *Cecil v. Beaver*, 28 Iowa 241; see 2 Iowa Law Bulletin 185.

¹¹ *Collins v. Smith*, 144 Iowa 200, 122 N. W. 839; *Hoyt v. Northrup*, 256 Ill. 604, 100 N. E. 164.

¹² *Newton v. Bealer*, *supra*; *McKemy v. Ketchum*, 175 N. W. 325.

¹³ *McKemy v. Ketchum*, *supra*.

¹⁴ *Stevens v. Stevens*, 256 Ill. 140, 99 N. E. 917; *Fullmer v. Rohrer*, 158 Cal. 755, 112 Pac. 544; *Sappingfield v. King*, 49 Or. 102, 89 Pac. 142.

¹⁵ *Purviance v. Jones*, *supra*.

ery.¹⁶ But in the absence of an existing agency, there is authority that retention of possession conclusively negatives delivery.¹⁷ Many courts, however, have used the same language as the deed cases—that effective delivery is a matter of manifested intent,¹⁸ and some have indicated that the declarations of the maker alone without further acts, are sufficient to show such an intent and so constitute a valid delivery. It should be noted that in other forms of written contracts, such as insurance policies, the delivery of the written instrument only becomes important when no other acceptance has been made by the offeree, and the delivery constitutes the acceptance. In such cases, the ordinary rules of offer and acceptance will control.¹⁹

THE IOWA COURT ON LIABILITY FOR UNWHOLESOME FOOD.—The recent case of *Davis v. Van Camp Packing Company*, (Iowa, 1920) 176 N. W. 382, was an action at law to recover damages from a manufacturer for an injury alleged to have been caused by eating unwholesome food placed on the market by defendant. The plaintiff offered evidence tending strongly to show that he was made sick by eating part of the contents of a can of pork and beans, which, having been put on the market by the defendant, was purchased from a retailer by the plaintiff's mother and served on the table at their home. The defendant introduced evidence which showed that it used a very high degree of care in the selection and preparation of this food for market, but which did not otherwise tend to overcome plaintiff's evidence that it was this food that made him sick. The plaintiff, after having abandoned the claim that there was a breach of an express warranty, claimed the right to go to the jury on two points: that the evidence was sufficient to support a verdict in his favor; first, on the ground of breach of an implied warranty of wholesomeness; second, on the ground that his prima facie case of negligence had not been overcome by the defendant. The judge required the plaintiff to elect whether he would proceed on the ground of implied warranty or of tort, and after all the evidence was in, the plaintiff having elected to stand on a tort action, there was a directed verdict for the defendant. This was held to be error; first, because the plaintiff should not have been required to elect between breach of implied warranty and tort, and second, because he was entitled to go to the jury on the question of negligence in spite of the defendant's evidence of the care used.

This result is in accord with the position taken in an article entitled "Unwholesome Food as a Source of Liability," which may be

¹⁶ *In re Reeve*, 111 Iowa 260, 82 N. W. 912; *Indiana Trust Co. v. Byram*, 36 Ind. App. 6, 72 N. E. 670.

¹⁷ *Fifer v. Rachels*, 27 Ind. App. 654; *Osbonner v. Eslinger*, 155 Ind. 351.

¹⁸ *Purviance v. Jones*, *supra*; *Streissguth v. Kroll*, 86 Minn. 325, 90 N. W. 577.

¹⁹ See "The Delivery of a Life-Insurance Policy", Edwin W. Patterson, 33 Harv. Law Rev. 198.

found beginning on page 6 and continued on page 86 of this volume. This article is referred to in the opinion as "an interesting discussion of this subject."

As the case was tried, after the forced election, on the ground of negligence, it may be well to mention that matter first. The principle upon which the plaintiff relies in this connection, although he does not name it, is that of *res ipsa loquitur*. His contention is that having introduced evidence which shows that he was injured by eating the defendant's product he has made out a prima facie case. That is, the very circumstance speaks of negligence of the defendant without any direct evidence pointing to the failure on his part to use care. Not only this, but even after the defendant has come forward and introduced evidence of great care in the process of preparing this food for the market, the plaintiff is still entitled to have the jury say whether such evidence overcomes the prima facie case which *res ipsa loquitur* has raised in his favor. If the case is left to the jury on this basis it will probably result in the wildest kind of a guess on their part unless proper instructions are given. Conceivably these instructions might be along either of two opposing lines. We might instruct the jury that their inquiry should be whether such care as they should find had been used by the defendant was sufficient under all the circumstances. We might on the other hand direct them that if they found that the plaintiff was injured by eating food which was unwholesome and did not find that this unwholesomeness was attributable to some source other than the selection and preparation of the defendant, they should return a verdict for the plaintiff. If the latter course is adopted it amounts to this: that while we speak in terms of negligence we require such care as will exclude all unwholesome and deleterious food products from the market. However great the care used, if it does not accomplish this result, it is insufficient and hence there is negligence. This is one of the possibilities pointed out in the article cited.

If the other theory as to negligence is adopted a case such as the instant one should not be left to the jury on both the questions of negligence and of breach of implied warranty, for the reason that it would be unnecessary and likely to confuse them. As there is no dispute as to the positions of the plaintiff and the defendant in this series of transactions in the instant case, the question of whether or not an implied warranty of wholesomeness existed is for the court to decide. If such a warranty did exist and the plaintiff was injured because of the unwholesomeness of the food put on the market, the defendant would be liable no matter how much care he had used. If this is true and the same question is put to the jury with instructions that the defendant is not liable on the grounds of negligence if he used due care, we have added nothing except the possibility of confusing the jury, for it is needless to mention that if the warranty of wholesomeness existed and if the food was unwholesome because of the negligence of the defendant, that warranty has been broken.

This invites inquiry as to whether there is any implied warranty of wholesomeness in a case of this nature. In cases in which the plaintiff bought directly from the defendant it is easy to speak in terms of such a warranty. Where the plaintiff is a sub-vendee of a retailer who purchased from the defendant this is not so easy, but perhaps we may consider it as a warranty that runs with the sale of personal property so as to be available between these parties. But where, as in this case, the plaintiff is neither a vendee nor a sub-vendee in any degree, it is clear that to speak, as the court does, in terms of a warranty which "runs with the sale and to the public" is to use language which has nothing whatever to do with the "intricacies of the law of sales and warranties." To appreciate this no more is necessary than to refer to the case of *Gearing v. Berkson*, (1916) 223 Mass. 257, in which a woman who was injured by eating unwholesome pork chops which she had purchased of a dealer, was denied any recovery against that person on the ground that in making the purchase she had really acted as the agent of her husband and consequently she did not have the benefit of any implied warranty, since that arises in favor of the vendee only. It is immeasurably refreshing to turn from such ratiocination to the language of the Iowa court, that "it may be treated as a representation or warranty that, because of the sacredness of human life, food products so put out are wholesome." The result thus produced is highly desirable and is entirely in accord with the modern trend of the cases in this country, but to use the word warranty in this situation is objectionable from two standpoints. First, it may lead us to try to draw unsound analogies from this situation to those in which there are truly implied warranties. Second, it may cause us to attempt to make a false application of the rule that an express warranty excludes any implied warranty involving the same subject matter. The peculiar manner in which the issues were taken before the Supreme Court practically required the court to talk in terms of negligence and of implied warranty. But since we have here a situation in which the defendant's liability may exist regardless of the amount of care used (on breach of "implied warranty") and which at the same time does not depend on contract or privity of contract, we have a liability which is grounded upon neither fault nor agreement. For this, the most appropriate expression seems to be "insurer's liability", as suggested in the article mentioned. It is unfortunate that counsel for the plaintiff did not insist upon the right to go to the jury with the instruction that if they should find out he was injured by eating unwholesome food prepared and placed on the market by the defendant, their verdict should be for the plaintiff. It is suggested that the development of the law has reached the stage where such a case should be so submitted to the jury, in the absence of any evidence tending to show that the deleterious quality of the food may have been due to some outside cause after having left the hands of the defendant. The

tendency of the present time is clearly to impose upon the manufacturer of human food an "insurer's liability" as to its wholesomeness, which is the practical effect of the instant case. But the time is at hand when we need no longer hesitate to call this responsibility by its true name.

ROLLIN M. PERKINS.

RECENT CASES

BILLS AND NOTES—CHECK AS ASSIGNMENT OF FUNDS—EFFECT OF NEGOTIABLE INSTRUMENTS LAW ON IOWA RULES.—The payee of a check presented it to a bank other than the bank of deposit and received payment. But before payment was made by the drawee bank, the funds in its possession were garnished by creditors of the drawer, who claimed the deposits as against the bank paying the check. Held, that the bank paying the check was entitled to the funds. *McClain v. Torkelson*, 174 N. W. 42. (Iowa Sup. Ct.)

Before the passage of the Negotiable Instruments Law, the rule was well settled in Iowa that a check of itself operated as an equitable assignment, giving title to the payee of so much of the drawer's funds on deposit as the amount for which the check was drawn. *Kuhnes v. Cahill*, 128 Iowa 594, 104 N. W. 1025; *Thomas v. Angus Bank*, 99 Iowa 202, 68 N. W. 780; *May v. Jones*, 87 Iowa 188, 54 N. W. 231; *Roberts v. Corbin*, 26 Iowa 315. In holding a check to be an equitable assignment, the courts have relied upon preceding cases having their origin in *Roberts v. Corbin*. In that case the court allowed the payee of a check to recover from the drawee bank as against the other claimants, the assignees of the drawer in insolvency, not so much on the grounds that the check operated as an equitable assignment but because of the implied promise made by the drawee bank with the drawer to pay out money according to his order. But whatever the reason, the law became well settled in Iowa that a check operated as an equitable assignment to the payee. This rule was contrary to the weight of authority even before the passage of the Negotiable Instruments Law. *McIntyre v. Farmers' Bank*, 115 Mich. 255, 73 N. W. 233; *Atty. Gen. v. Cont. Ins. Co.*, 71 N. Y. 325. See also cases cited in 5 CORPUS JURIS, "Assignment", §82 (2).

The Negotiable Instruments Law provides in accordance with the weight of authority at common law, that a check does not operate as an assignment of so much of the funds on deposit, and that a drawee bank will not be liable to the payee until it has accepted or certified the check. Code Supp. §3060a 189. In the case of *Hove v. Stanhope Bank*, 138 Iowa 39, 115 N. W. 476, the Iowa court in interpreting this provision said that since the statute was enacted only to protect banks against double payment of checks, in an action in equity where all the parties were in court with no possibility of loss to the bank, the section would not apply so as to protect cred-

itors of the drawer as against the payee. But the decision in that case, in spite of the language of the court, went upon the grounds that there was evidence other than the check of an actual assignment of the funds. The case under discussion goes a step further in limiting the effect of the statute by holding that even in a law action as between the drawer, his creditors and the bank, a check still operates as an assignment of the funds. In this interpretation, the Iowa court is again opposed to the weight of authority. *Kaese-meyer v. Smith*, 22 Ida. 1, 123 Pac. 943; *Boswell v. Citizens Bank*, 123 Ky. 485, 96 S. W. 797; *Bowher v. Haight*, 146 Fed. 257; *Baltimore Ry. Co. v. Nat. Bank*, 102 Va. 753, 47 S. E. 330. The conclusion which the court comes to in the principal case seems contrary to the express words of the statute. The Act says that a check shall not operate as an assignment, and there is nothing to indicate that it is not to apply under all circumstances. The court in limiting its effect seems to be attempting to preserve the Iowa rule prior to the Act and this attempt is unfortunate. The purpose of the Negotiable Instruments Law, as of other uniform statutes, is to make certain and uniform the laws of the several States, but this purpose may be defeated by court decisions, narrowly interpreting the statutes so as to give effect to the former local law. The courts of Kentucky and Virginia have recognized that the Negotiable Instruments Law has changed the common law of those States on the point. *Taylor's Adm. v. Taylor's Assignees*, 78 Ky. 470; *Boswell v. Citizens Bank*, *supra*; *Baltimore Ry. Co. v. Nat. Bank*, *supra*. It is to be regretted that the Iowa court has refused to give a similar broad interpretation to a uniform act.

BILLS AND NOTES—HOLDER IN DUE COURSE—COMPLETE AND REGULAR INSTRUMENT—UNSTAMPED NOTE.—In an action by the indorsee of a promissory note against the maker, the former alleged that he was a holder in due course, and claimed the instrument free from a defense which the maker had against the payee. The note sued on was never stamped, either at the time of or after delivery, as required by the Act of Congress, Oct. 3, 1917, c. 63, §807. Held, that an unstamped note is not "complete and regular on its face" under §3060-a 52, Code Supp. 1913, and the purchaser thereof is not a holder in due course. *Lutton v. Baker*, 174 N. W. 599. (Iowa Sup. Ct.)

The effect of a failure to stamp negotiable instruments as required by federal laws has been the subject of much difference of opinion. By the weight of authority, under the stamp acts of 1862 and 1898, a negotiable instrument was not void because unstamped unless fraud or an intent to evade the statute was proved. *Dowell v. Applegate*, 7 Fed. 881; *Bowen v. Bryne*, 55 Ill. 467; *Sammons v. Holloway*, 21 Mich. 162. Some early Iowa cases adopted a stricter rule, holding that an unstamped note was absolutely void. *Hugus v. Strickler*, 19 Iowa 413; *City v. Sterneman*, 30 Iowa 528; but

later cases soon modified the rule, following a decision of the United States Supreme Court in accord with the majority view. *Campbell v. Wilcox*, 10 Wall. 421; *Mitchell v. Ins. Co.*, 32 Iowa 425; *Ricord v. Jones*, 33 Iowa 27.

By what was probably the weight of authority before the Negotiable Instruments Law, the fact that a note was unstamped did not prevent a purchaser from becoming a holder in due course. *Ebert v. Gitt*, 95 Md. 186; *Burson v. Huntington*, 21 Mich. 415, 438. But in Iowa, the court early indicated that the purchaser of a note required to be stamped, would only be protected where it appears that at the time of purchase he did not know that the note was not stamped at its issue. *Blackwell v. Denie*, 23 Iowa 63; *Anderson v. Starkweather*, 28 Iowa 409; *Sperry v. Horr*, 32 Iowa 187. The case of *Bank v. Dougherty*, 29 Iowa 260, held squarely that the purchaser would not be protected where he admitted that he knew that the note was not stamped when made. This seems to have been a well settled rule in Iowa before the uniform statute.

By §3060a 52, Code Supp. 1913, a purchaser of a note is not a holder in due course unless the instrument is "complete and regular on its face". The court in the present case held that an unstamped instrument does not meet the requirements of the statute. In this interpretation, the court relied to some extent upon the case of *In re Philpot's Estate*, 169 Iowa 555, 151 N. W. 325, where it was held that a note payable "on or before 4..... after date" was not complete and regular on its face. That was a clear case, since the time when the note was to come due was uncertain and the instrument was clearly incomplete. Search has not revealed a decision in point.

As an original proposition, it seems difficult to find a sound basis for holding that the lack of a revenue stamp is sufficient to charge a purchaser with notice of equities, or prevent a note from being "complete and regular on its face." It is submitted that this provision in the Negotiable Instruments Law was intended to apply to the essentials of the note, and directed at omissions and irregularities which would tend to put a purchaser upon inquiry, whereas the requirement as to stamping is a purely collateral matter which may be fulfilled even after the action has been brought. *Ebert v. Gitt*, 95 Md. 186, 193; *Foster v. Holby*, 49 Ala. 593; *Redlich v. Doll*, 54 N. Y. 234.

BILLS AND NOTES—HOLDER IN DUE COURSE—EFFECT OF STATUTE MAKING INSTRUMENT VOID.—The plaintiff, claiming to be a good-faith holder for value, sues on a check given by the defendant in payment of a gambling debt. Held, that the check is void even in the hands of a holder in due course, and that Code §4965 is not repealed by the Negotiable Instruments Law. *Plank v. Swift*, 174 N. W. 236. (Iowa Sup. Ct.)

By Code §4965 all promises, notes, etc., given in consideration of a gambling debt are absolutely void. Even though they have come to the hands of a holder in due course he cannot recover. *Traders Bank v. Alsop*, 64 Iowa 97, 19 N. W. 863; *First Nat'l Bank v. Carroll*, 80 Iowa 11, 45 N. W. 304. The Negotiable Instruments Law says, "A holder in due course holds the instrument free from any defect of title of prior parties, and free from defences available to prior parties among themselves. . . ." Code Supp. §3060-a57. This seems to be in conflict with §4965 but in a case involving usury it has been held that the usury statute was not repealed by implication. *Perry Savings Bank v. Fitzgerald*, 167 Iowa 446, 149 N. W. 497, commented on, 1 Iowa Law Bulletin 91. It is argued that usury is not a defect of title because of illegal consideration, but is a real defense that is available, not merely among the prior parties themselves, but against all the world, and that being a real defense, it attaches to the instrument itself, regardless of the merits or demerits of the holder. This same argument applies to a note given in consideration of a gaming debt. *Alexander v. Hazelrigg*, 123 Ky. 677, 97 S. W. 353; *Twentieth Street Bank v. Jacobs*, 74 W. Va. 525, 82 S. E. 320.

There is some authority that statutes making a "gaming consideration" a real defense are impliedly repealed by the Negotiable Instruments Law. *Wirt v. Stubblefield*, 17 App. D. C. 283; but the great weight of authority is *contra*. *Cochran v. German Insurance Bank*, 9 Ky. Law Rep. 196; *Twentieth Street Bank v. Jacobs*, *supra*. The argument for a contrary result rests on the desirability of uniformity in rules governing commercial paper under the N. I. L. This does not appear to have been of sufficient weight to affect court decisions when balanced against strong local policy against usury and gambling.

CONSTITUTIONAL LAW—IMPAIRMENT OF OBLIGATION OF CONTRACT—CONTRACT FIXING PUBLIC UTILITIES RATES—LEGISLATIVE REGULATION NOTWITHSTANDING SUCH CONTRACT.—In 1903 the defendant company accepted a franchise fixing the rates for gas to be supplied by it for the ensuing twenty-five years. In March, 1919, the city council passed an ordinance increasing the rates fixed by the franchise of 1903. The plaintiff, in behalf of himself and other gas consumers, filed a bill in equity to enjoin the defendant company from collecting the increased rates under the new ordinance. Held, that the municipal regulation of rates was valid, notwithstanding the existing contract. *Selkirk v. Sioux City Gas and Electric Co.*, 176 N. W. 301. (Iowa Sup. Ct.)

The acceptance of a franchise by a public utilities company results in the formation of a contract between the State or city, as the case may be, and the company. *State v. Home Tel. & Tel. Co.*, 102 Wash. 196, 172 Pac. 899; *Omaha Water Co. v. Omaha*, 147 Fed. 1. The majority of decisions have held that such a contract is within

the constitutional guaranty against impairment, and that subsequent legislative regulation which affects the obligation of the contract is unconstitutional. *Vicksburg v. Vicksburg Water Works Co.*, 202 U. S. 453; 50 L. Ed. 1102; *Detroit v. Detroit Citizens Street Ry. Co.*, 184 U. S. 368; 46 L. Ed. 592; *City of Bessemer v. Bessemer Waterworks*, 152 Ala. 391, 44 So. 663. The tendency of the more recent decisions is to consider that such contracts are not within the protection of the contract clause in so far as subsequent legislative regulation is concerned. *Ft. Smith Light etc. Co. v. Ft. Smith*, 202 Fed. 581; *City of Portland v. Public Service Commission*, 89 Or. 325, 173 Pac. 1178. Some cases adopting this view maintain that the statute authorizing the regulation of rates becomes a part of the contract. With this term added to the contract there is no impairment of its obligation by subsequent regulation under the statute. *Arkadelphia Electric Light Co. v. Arkadelphia*, 99 Ark. 178, 137 S. W. 1093; *Woodburn v. Public Service Commission*, 82 Or. 114, 161 Pac. 391. Other cases are decided on the broad ground that for reasons of public policy a State cannot grant away its power to regulate public utilities. *Murray v. Pocatello*, 226 U. S. 318; *Ft. Smith Light etc. Co. v. Ft. Smith*, *supra*. Based upon either ground the result of these cases is very desirable, for the power to regulate rates of public utilities is an important legislative power, the uninterrupted exercise of which is highly necessary, both for the protection of the public and the public service corporation.

Section 725 of the 1913 supplement to the Code of Iowa vests in the municipality the power to regulate and fix the rates for water, gas, heat, light, or power. It is an express delegation to the municipality of the legislative rate making power. The Iowa cases have uniformly held that this statute becomes a part of all contracts between cities and public service corporations, and consequently that subsequent rate regulation by the city is valid and not a violation of the constitutional guaranty against impairment of the obligation of contracts. *Cedar Rapids Gas Company v. Cedar Rapids*, 223 U. S. 655, 56 L. Ed. 594; *Iowa Railway and Light Co. v. Jones*, 182 Iowa 982, 164 N. W. 780; *Town of Williams v. Iowa Falls Electric Co.*, 170 N. W. 815 (Iowa Sup. Ct.); *Dubuque Electric Co. v. City of Dubuque*, 260 Fed. 353. The instant case is fully in accord with the preceding Iowa decisions.

CONTRACTS—AGREEMENT PAYABLE AT CONTINGENT FUTURE TIME—TIME OF PAYMENT WHEN PROMISOR PREVENTS HAPPENING OF CONTINGENCY.—The defendant executed an instrument in the form of a promissory note, payable "when the present indebtedness of Highland Park Company is paid." This instrument was given in part payment for a controlling interest in the company. Later defendant reorganized this corporation into a new one, depriving the original company of power of paying its obligations. Held, the payment was due after a reasonable time for paying the debts.

Dille v. Longwell, 176 N. W. 619. (Iowa Sup. Ct.)

While the instrument is called a "promissory note", it is clear that any recovery must be upon a breach of an ordinary contract. Uncertainty of time prevents the instrument from being negotiable under the statute. Code Supp. §3060a 1 and §3060a 4. Nor would it be entitled to any advantages of a non-negotiable note over a written contract, though that point is not important under local statutory provisions. See "Nonnegotiable Bills and Notes", 5 Iowa Law Bulletin 65.

It is a rule of contracts that when the time for a debtor's liability to accrue is based upon the happening of some event, and he makes this happening impossible, the debt becomes due, nevertheless. *Wolf v. Marsh*, 54 Cal. 228. The principal case could have been decided upon this point alone. And if the debt is conditioned upon an event over which the promisor, and no one else, has control, the intention of the parties is interpreted to be that an effort shall be made to cause the event to happen within a reasonable time, and after the lapse of such time the debt is due although the event has not happened. *Hicks v. Shouse*, 17 B. Mon. (Ky.) 483. However, the above rules apply only if the promise is absolute and it is the time alone which is conditional. *Noland v. Bull*, 24 Or. 479, 33 Pac. 983; *Swift Coal & Timber Co. v. Lewis*, 170 Ky. 588, 186 S. W. 479. Whether or not the promise is absolute is dependent upon the intention of the parties, which is a fact to be determined by the construction of the contract in connection with the surrounding circumstances. *Noland v. Bull*, *supra*. If the promise is not absolute, then, of course, the debt is not due unless the event happens. *Black v. Coleman*, 22 Wis. 415, 99 Am. Dec. 53. The main point in all such cases is whether it is the *debt* which is conditional or only the *time of payment*. If the parties think that a certain event will surely happen and fix that as the time for liability to accrue, then the debt is absolute and will become due within a reasonable time although the event never occurs. *Nunez v. Dautel*, 19 Wall. 560. The principal case states the general rule of law.

CONTRACTS—COVENANT TO SUPPORT—EFFECT OF CONVICTION FOR FELONY ON PROMISEE'S CLAIM.—The plaintiff conveyed certain premises to the defendant, his niece, in consideration of her agreement to give him support and a home upon the premises and to bury him after his death. The right of the plaintiff to a home and support was made an express lien upon the premises. Nothing was said in this respect about the provision for burial. Seven months after the deed took effect the plaintiff wrongfully killed the defendant's husband. For this he was convicted and sentenced to life imprisonment but was pardoned six years later. Then he brought this action to cancel the deed to the defendant for her failure to give him a home and support. Held, the defendant holds the premises discharged of all obligation on her part. *Hall v. Crook*, 174 N. W. 519. (Minn. Sup. Ct.)

A life convict, though civilly dead by statute, is nevertheless not deprived of his property rights. *Hill v. Guaranty Trust Co.*, 163 App. Div. (N. Y.) 374; *Avery v. Smith*, 110 N. Y. 317, 18 N. E. 148. A deed in consideration of the future support of the grantor belongs to a peculiar class, for the consideration involves personal services on the part of the grantee. Support is valuable consideration. *Gardner v. Lightfoot*, 71 Iowa 577, 32 N. W. 510; *Lewis v. Wilcox*, 131 Iowa 268, 108 N. W. 536; *Steen v. Steen*, 169 Iowa 264, 151 N. W. 115. Conveyances in consideration of future support involve forfeiture for failure of the consideration. *Tysar v. Adams*, 116 Va. 239, 81 S. E. 76, 12 Ann. Cas. 902. And while equity will accord relief for non-performance of the agreement to support, *Patterson v. Patterson*, 81 Iowa 626, 47 N. W. 768, there is considerable conflict not only as to the grounds and form of relief but as to the exact nature of the transaction itself. *Abbott v. Saunders*, 80 Vt. 179, 66 Atl. 1032; 12 Ann. Cas. 898, 8 R. C. L. 927; 13 L. R. A. (N. S.) 725 note.

The language of the deed in the principal case necessarily calls for personal care and attention of the grantor on the part of the grantee. The Minnesota court accordingly says that the plaintiff by wrongfully killing the defendant's husband has made it impossible for her further to perform her agreement in the spirit in which it was intended. Since he cannot take advantage of the impossibility of performance which he has created, his right to care and support are forfeited. This is in accordance with the rule that where the breach is the grantor's fault he cannot claim rights by reason thereof. *Woolcott v. Woolcott*, 133 Mich. 643, 95 N. W. 740; *Dwelley v. Dwelley*, 143 Mass. 509, 10 N. E. 468. However, the cases on which this rule was founded are all cases in which the grantor had made it physically impossible for the grantee to perform; as when the grantor left the place where the support was to have been furnished. *Lewis v. Lewis*, 70 Conn. 630, 51 Atl. 854. In the principal case the situation is different, for there any impossibility of performance due to the conduct of the grantor is moral, not physical. But the Minnesota court assumes the same rule applies in either situation and though no cases have been found in support of this assumption it seems sound.

The obligation to give burial the majority of the court construed to be a personal obligation, since it was not in terms made a charge on the premises, though the obligation to give support was made a charge. Being a personal obligation it did not affect the defendant's interest in the land.

DAMAGES—INTEREST—INTEREST ON CLAIM UNDER FEDERAL EMPLOYERS' LIABILITY ACT.—The widow of an employee of the defendant railroad brought an action under the federal Employers' Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65) to recover for the death of her husband. In the trial court the plaintiff secured a judgment for \$5000. The plaintiff now asks for interest

on this amount from the date of decedent's death up to and including the date the verdict was returned. Held, the damage not being complete at a given time, interest will not be allowed. *Bennett v. A. T. & S. F. Ry. Co.*, 174 N. W. 805. (Iowa Sup. Ct.)

It is the settled law of this State that interest may be allowed on unliquidated claims in cases in which the entire damage for which recovery is demanded was complete at a definite time before the action was begun. *Collins v. Coal Co.*, 140 Iowa 124, 118 N. W. 36; *Black v. M. & St. L. Ry. Co.*, 122 Iowa 32, 96 N. W. 984; *Hollingsworth v. Des Moines and St. L. Ry. Co.*, 63 Iowa 447, 19 N. W. 325. But in laying down that rule the Iowa court has gone beyond what some authorities have been willing to allow. See collection of cases in 28 L. R. A. (N. S.) 72. The rule allowing interest properly applies in cases of injury to property effecting its destruction or conversion, or other unlawful or fraudulent misappropriation or detention of property or money. But the measure of damages in that class of cases is not at all the same as that in cases of personal injury. The latter includes all the compensation which is requisite to cover pain, suffering, and disability to the date of judgment and prospectively. The sum given is intended to be and is the full measure of recovery and it cannot be supplemented by any new element of damages for the detention of this sum from the date of the injury. *Louisville Co. v. Wallace*, 91 Tenn. 35, 17 S. W. 882; *Ratteree v. Chapman*, 79 Ga. 574, 4 S. E. 684; *Lester v. Highland Co.*, 27 Utah 470, 76 Pac. 341; *Richmond v. Ry. Co.*, 33 Iowa 502. As a general rule in cases of personal injury, the damages are continuing and incomplete at the date of trial, so it is manifestly improper to compute them as of the time of injury and allow interest from that time. *Jacobson v. U. S. Gypsum Co.*, 150 Iowa 330, 130 N. W. 122.

The instant case is an action by a widow for loss of support. The statute contemplates compensation to the widow, next of kin, etc., for loss *from the death*, not for the injuries to the deceased. The extent of the damage is to be measured by the pecuniary loss sustained. *McCullough v. Ry. Co.*, 160 Iowa 528, 142 N. W. 69, 47 L. R. A. (N. S.) 23. So here the widow's damage is measured by the loss of that support which she would have received from her husband had he been permitted to live out his expectancy. It is plain that such damage is not complete at any time, but is a continuing one dependent not only on expectancy of the husband but upon the widow's own expectancy. The measure of damage being thus fixed, it is expected that the jury in determining the sum given in gross made it a fair and just compensation, covering all the damage no matter when accruing.

The only difficulty encountered in deciding this case was in a decision by the court in *Bridenstine v. Iowa City Electric Ry. Co.*, 181 Iowa 1124, 165 N. W. 435. There the administrator sued under our statute (Code Supp. §3477 a) for death by wrongful act and

the court allowed interest on the judgment from the date of death. Whatever be the merits of the case, it was distinguished by the court from the instant case by saying that in the *Bridenstine* case the action was brought under our local statute for loss of services, while here the widow is suing under the federal statute for loss of support.

Although there is but little authority on the federal Employers' Liability Act, there are two cases holding that since the statute makes no provision for interest, it should not be allowed. *Norton v. Erie Ry. Co.*, 163 App. Div. 468, 148 N. Y. Supp. 771; *Grow v. Oregon Short Line*, 47 Utah 26, 150 Pac. 970.

DEATH BY WRONGFUL ACT—DAMAGES—RECOVERY OF FUNERAL EXPENSES.—The administratrix of the estate of Pat Brady brought an action to recover for injuries causing his death. It is admitted that he came to his death through the negligence of the defendant. The plaintiff included in her claim for damages the sum spent for funeral expenses. The lower court instructed the jury to allow such reasonable funeral expenses as was shown by the evidence. Held, such damages were not recoverable in an action of this nature. *Brady v. Haw*, 174 N. W. 331. (Iowa Sup. Ct.)

The right of an administrator to sue for death by wrongful act rests solely upon statute, for at common law actions *ex delicto* died with the party. *Humby v. Trott*, 1 Cowp. 371; *Shafer v. Grimes*, 23 Iowa 550. Nor could an action be brought by the relatives of the deceased at common law, for the rule was that the death of a human being could not be complained of as a civil injury. *Baker v. Bolton*, 1 Camp. 493; TIFFANY, *DEATH BY WRONGFUL ACT*, pp. 1-11. The statutes of Iowa simply provide that all causes of action shall survive and may be brought by the personal representative or successors in interest of the deceased. Code (1897) §§3443-5. These statutes have been held not to create a new cause of action, but simply provide that the one to which the decedent was entitled passes to the personal representative for the benefit of the estate. *Sachs v. Sioux City*, 109 Iowa 224, 80 N. W. 336; *Major v. Burlington, etc., Ry. Co.*, 115 Iowa 309, 88 N. W. 815; *Flynn v. R. R. Co.*, 159 Iowa 571, 141 N. W. 401. Although the "death act" in the Code of 1851 (§2501) was repealed when the present statutes were enacted, the court has said that the effect of our present Code provisions is the same as though the express language of the Code of 1851 had been retained. *Connors v. B. C. R. & N. Ry. Co.*, 71 Iowa 490, 32 N. W. 465. Under this construction the court has allowed the administrator to recover damages measured by the value of the life of the deceased to his estate, taking into consideration the age of decedent, his expectancy of life, health, habits, experience, earning capacity and everything else that would tend to assist the jury in arriving at a just and reasonable sum that would compensate the estate for the loss occasioned by his death.

Beems, Admr. v. C. R. I. & P. Ry. Co., 58 Iowa 150, 12 N. W. 222, and cases cited in 2 Iowa Law Bulletin, 199, note 27. For further discussion see this reference.

The question in this case is whether in an action by the administrator under these statutes, funeral expenses are a proper element of damage. They cannot properly be said to be a loss to the estate caused by the wrongful act of the defendant, for it is an expense that undoubtedly would be incurred by the estate had the deceased been permitted to live out his expectancy. Of course there are possible situations in which the estate would not be called upon to pay funeral expenses, but they are so remote and improbable that they may be disregarded. Since then the funeral expense would ultimately have fallen on the estate, the only loss which comes as a proximate result of the wrong is that this expenditure is prematurely forced upon the estate. The wrong lies in the fact that the wrongful act of the defendant has compelled the estate to make an expenditure, which in the ordinary course of nature, it would not be required to make for many years. As the learned court said, whatever loss occurs from this wrong should be compensated, and should be an element to be considered by the jury in determining the present worth of that which the plaintiff would, if permitted to live out his expectancy, have accumulated and left to his estate.

The English cases have held that in an action under the Death Act (9 & 10 Vic. c. 93) funeral expenses are not recoverable. *Dalton v. S. E. Ry. Co.*, 4 C. B. (n. s.) 296, 4 Jur. (n. s.) 711. The same result was reached in several of our courts under like statutes. *Consolidated Traction Co. v. Hone*, 60 N. J. L. 444, 38 Atl. 759; *Holland v. Brown*, 35 Fed. 43, 13 Sawy. 284 (Ore. Statute); *St. Louis etc. Ry. Co. v. Sweet*, 57 Ark. 287, 21 S. W. 587; *Trow v. Thomas*, 70 Vt. 580, 41 Atl. 652. But funeral expenses are a legitimate element of damage in an action for loss or services and similar cases where the beneficiary has paid them or was under obligation to pay them. *Owen v. Brockschmidt*, 54 Mo. 285; *Murphy v. N. Y. C. etc. Ry. Co.*, 88 N. Y. 445; *Petrie v. Columbia & G. R. Co.*, 29 S. C. 303, 7 S. E. 515; *Carnego v. Crescent Coal Co.*, 164 Iowa 552, 146 N. W. 38. In those cases the funeral expense is paid by one on whom it would not ultimately have fallen had deceased been permitted to live out his expectancy. The action is not one for the benefit of the estate of the deceased. So it was proper that they should be allowed to recover the full amount of the funeral expense as it was a loss directly occasioned on them by the wrongful act of the defendant. The distinction between that class of cases and the present is obvious.

INJUNCTIONS—ACTS RESTRAINED—PROSECUTION OF SUIT IN ANOTHER STATE.—The plaintiff, a citizen of Iowa, brought an action in Missouri for the recovery of damages. The acts complained of were done in Iowa. The defendant was a railroad corporation

whose line extended through both States and was subject to service in both. The defendant obtained a temporary injunction in Iowa restraining further prosecution of the suit in Missouri. The injunction was dissolved on motion. Held, that the injunction was proper and should be restored. *Wabash Ry. Co. v. Peterson*, 175 N. W. 523. (Iowa Sup. Ct.)

Equitable jurisdiction in a proper case of this nature has long been established. *Lord Portarlington v. Soulby*, 3 Myl. & K. 104. The decree is directed against the person and not against the courts of a sister State. *Jones v. Hughes*, 156 Iowa 684, 137 N. W. 1023; *Weaver v. Alabama G. S. Ry. Co.*, 76 So. 364. Such an injunction does not contravene the constitution or laws of the United States. *Cole v. Cunningham*, 133 U. S. 107, 33 L. Ed. 538. For equity to act in any case there must be jurisdiction of the subject matter, jurisdiction of the person, and a sound discretion in rendering the decree. An injunction against foreign proceedings must rest on the normal ground, *viz.*, inadequacy of legal relief. In two types of cases, legal relief would seem inadequate. First, where there is an evasion of local law or State policy. The evasion of local exemption laws is an example. *Teager v. Landsley*, 69 Iowa 725, 27 N. W. 739; *Hager v. Adams*, 70 Iowa 746, 130 N. W. 36. Other instances are the evasion by a resident of State insolvent laws, *Dehon v. Foster*, 89 Mass. 57; interference with the principal administration of a decedent's estate through ancillary administration abroad, *In re Williams' Estate*, 130 Iowa 553, 107 N. W. 608; or embarrassment of the State court in a divorce proceeding by proceedings abroad. *Von Bernuth v. Von Bernuth*, 76 N. J. Eq. 177, 73 Atl. 1049. A second class of cases where legal relief is inadequate would be in cases where jurisdiction exists to restrain a local action. Considerations of interstate harmony might render the decree less readily obtainable here. Foreign actions in bad faith and with a view to harassment should be enjoined. *Reed v. Hollingsworth*, 157 Iowa 94, 135 N. W. 137; *Royal League v. Kavanaugh*, 223 Ill. 175, 84 N. E. 178. Likewise purely vexatious suits, as where an action previously determined is sued a second time outside the jurisdiction. Though the former judgment is a bar, equity should act. *O'Haire v. Burns*, 45 Colo. 432, 101 Pac. 755; *contra*, *Gray v. Coan*, 36 Iowa 296. In the matter of double litigation, where plaintiff sues both at home and abroad, the cases do not accord. Where the foreign proceeding is prior in time, courts are particularly loathe to enjoin. *Home Ins. Co. v. Howell*, 24 N. J. Eq. 238; *Bel-lows Falls Bank v. Rutland*, 28 Vt. 470. It would seem that an injunction should not issue until an opportunity has been given to elect one of the two suits. Where domestic litigation seeks the complete avoidance and cancellation of instruments, prior to a determination, any action abroad seeking recovery should be enjoined. *Frick v. Hinkley*, 122 Minn. 24, 141 N. W. 1096.

On the other hand, an injunction will not issue on the basis of distrust of the courts of a sister State, *Cole v. Young*, 24 Kans. 435,

nor because there is a deprivation of any right to be sued at home, *Wade v. Crump*, 117 S. W. 538, nor because of convenience, *American Express Co. v. Fox*, 187 S. W. 1117, nor because the procedure abroad might be less advantageous to the person seeking the injunction, since there is no vested right in procedure. *Jones v. Hughes*, *supra*; *Ill. Life Ins. Co. v. Prentiss*, 277 Ill. 383, 115 N. E. 554. In other situations there is a conflict of opinion. The cases are divided as to whether the necessity of transporting witnesses to another State or presenting evidence by depositions is an irreparable injury. The instant case adopts this view and is supported by *Reed's Adm'x v. Ill. Cent. R. R.*, 206 S. W. 794; *Miller v. Gittings*, 85 Md. 601, 37 Atl. 372; *contra*, *Ill. Life Ins. Co. v. Prentiss*, *supra*. It was held insufficient where not shown that testimony available in the home State could not be used abroad. *Freick v. Hinkley*, *supra*.

In favor of the injunction are the facts that the action arises in the home State and the parties and witnesses are there. The opposing argument is that the foreign court has jurisdiction, there are no vested rights in procedure, the foreign State will apply the substantive law of the place where the action arose, and interstate harmony does not sanction an improvident use of the injunction. The Michigan court says an injunction should never issue because of the difficulty of presenting testimony abroad, unless the aggrieved party, through poverty, cannot present his equities to the foreign court. *Wells Lumber Co. v. Menominee etc. Co.*, 168 N. W. 1011. It would allow the foreign court to grant the injunction, if so disposed. The present Iowa case takes a decided stand on this latter point. The case relies on an Iowa statute which the court construes to be declaratory of the public policy of the State.

For further discussion of the general question see 33 Harv. L. Rev. 92.

LIMITATION OF ACTIONS—NONRESIDENT OF STATE—TOLLING RUNNING OF STATUTE.—In September, 1914, the plaintiff suffered an injury caused by the alleged negligence of the defendant. In December, 1915, the defendant and his family went to California on a 90 day trip of combined business and pleasure. Code §3451 provides that the time during which the defendant is a nonresident of the State shall not be included in computing the period of limitation. Code §3450 provides that delivery of the original notice to the sheriff of the proper county is a commencement of the action. Held, that the duration of the defendant's absence should not be deducted from the period of limitation. *Platt v. Carter*, 174 N. W. 786. (Iowa Sup. Ct.)

Residence is used to indicate the place of dwelling, whether permanent or temporary; domicile is used to denote a fixed permanent residence to which, when absent, one has the intention of returning. *Cohen v. Daniels*, 25 Iowa 88. In decisions interpreting the term residence as used in statutes of limitation this distinction is more

frequently ignored than recognized. *Hallet v. Bassett*, 100 Mass. 167; *Campbell v. White*, 22 Mich. 178; *Venable v. Paulding*, 19 Minn. 488. Even if it be said that the residence is something less than domicile, still it is something more than mere presence. A casual or temporary sojourn does not constitute residence. *Barney v. Oelrichs*, 138 U. S. 529, 34 L. Ed. 1037; *Pells v. Snell*, 130 Ill. 379, 23 N. E. 117. When a party is domiciled in one state but temporarily absent therefrom for a predetermined, definite period of time no change in residence takes place. *Johnson v. May*, 49 Neb. 601, 68 N. W. 1032; *Fuller v. Bryan*, 20 Pa. 144. Apply these principles to the present case and it is apparent that the defendant did not become a resident of California because his absence was temporary and its duration was predetermined, for 90 day round trip tickets were purchased.

In this case the court's opinion is that the defendant, because of the character of his absence, did not become a nonresident. As an additional reason for its decision, the court applies the test of the ability of the plaintiff to toll the running of the statute by commencement of the action. In jurisdictions in which the statute provides for the deduction of such time as the defendant shall be absent from the state, judicial decision has frequently applied this test. *Niblack v. Goodman*, 67 Ind. 174; *Blodgett v. Utley*, 4 Neb. 25. Where the statute provides not for the subtraction of the period of absence, but for the subtraction of the period of nonresidence such a test is not applied. *Barney v. Oelrichs*, *supra*; *Kerwin v. Sabin*, 50 Minn. 320, 52 N. W. 642; *Drew v. Drew*, 37 Me. 389; *contra*, *Garth v. Robards*, 20 Mo. 523, 64 Am. Dec. 203. These cases show that the proper criterion of residence is the character of the defendant's absence from the state of his domicile (at the time the cause of the action accrued) and not the power of the plaintiff to interrupt the running of the statute. This is the view adopted by the Iowa decisions. *Penley v. Waterhouse*, 1 Iowa 498, was not decided under a statute providing for deduction of the period of nonresidence, but under one providing for deduction of the period of absence. *Stern v. Selleck*, 136 Iowa 291, 111 N. W. 451; *Drake v. Stuart*, 87 Iowa 341, 54 N. W. 223; and *City of Davenport v. Allen*, 120 Fed. 172, sustain the view that the character of the absence is the proper and only test of nonresidence.

Assuming that the power of the plaintiff to toll the running of the statute is a proper test of residence in a state other than the state of domicile (at the time the cause of action accrued) was it properly applied in the instant case? The court stated that the plaintiff could have stopped the running of the statute by delivery of the original notice to the sheriff of the proper county as provided by Code §3450. This was a personal action of tort and by Code §3501 the proper county in which to bring such an action is that of the residence of the defendant. In order to maintain that the plaintiff could have interrupted the running of the statute by

delivery of the original notice the court must assume that the defendant was a resident of Iowa. A nonresident is one not residing in the jurisdiction. The court, therefore, in its initial premise assumed the conclusion it was attempting to prove.

The decision in the case is correct, for, as shown, the defendant because of the character of his absence did not become a non-resident.

LIMITATION OF ACTION—PLEADING—AMENDMENTS RE-STATING CAUSE OF ACTION.—The plaintiff alleged in his original petition that he was injured while employed as a section hand on the defendant's railroad. After a verdict for the plaintiff under Code §2071, appeal, and reversal on the grounds that the statute was not applicable, the plaintiff amended his petition, restating allegations of negligence, and alleging that the defendant at the time of the accident was engaged in interstate commerce, and asking recovery under the federal Employers' Liability Act. To this amendment, the defendant set up the statute of limitations in bar. The original petition was filed ten months after the accident occurred, but the amendment was not made until after the statutory period of two years had expired. Held, that the amendment related back to the date of the original petition and the action was not barred by limitation. *Lammers v. C. G. W. Ry. Co.*, 175 N. W. 311. (Iowa Sup. Ct.)

The question as to whether an amendment to a petition is barred by the statute of limitations, depends in turn upon whether the amendment states a new cause of action. If it does, the statute is arrested only from the date of the amendment. *Walker v. Iowa Cent. Ry. Co.*, 241 Fed. 395; *Gordon v. C. R. I. & P. Ry. Co.*, 129 Iowa 747, 106 N. W. 177. If it merely amplifies the original petition, it relates back to its date. *Sachra v. Manila*, 120 Iowa 562, 95 N. W. 198; *Basham v. C. G. W. Ry. Co.*, 178 Iowa 998, 154 N. W. 1019. In determining whether or not an amendment states a new cause of action, much confusion has arisen in cases like the instant one, when the amendment asks recovery under a particular statute not set forth in the petition. The courts have declared that where there is a "change from law to law", a new cause of action is stated. *Union Pac. Ry. Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877. The real question is, does the setting forth of a statute in an amendment, not relied on in the petition, make the amendment state a new cause of action? The answer depends entirely upon whether the original petition itself stated a cause of action sufficient under the statute specifically pleaded in the amendment. If it does, then the amendment merely amplifies it.

Clearly the petition must set forth all the facts necessary for a recovery under the statute pleaded in the amendment. *Jorgenson v. Grand Rapids & I. Ry. Co.*, 189 Mich. 537, 155 N. W. 535. Must it specifically allege the statute? The general rule is that laws of

which the court takes judicial notice need not be pleaded; whereas, other laws must be alleged and proved as matters of fact. *Barry v. Snowden*, 106 Fed. 571; *Stubblefield v. St. Louis & S. F. Ry. Co.*, 184 S. W. 149. A federal court takes judicial notice of all federal and State statutes; a State court of all federal acts and statutes of its own State, but not those of other States. *Pipes v. Mo. Pac. Ry. Co.*, 267 Mo. 385, 184 S. W. 79; *Grand Trunk Ry. Co. v. Lindley*, 233 U. S. 42, 34 Sup. Ct. 581. Consequently a petition in a State court alleging facts sufficient for recovery under either a State or federal statute need not specifically set forth either, and an amendment definitely asking for a recovery under the one or the other would not be a departure. *Nash v. Minn. Ry. Co.*, 169 N. W. 540. (Minn. Sup. Ct.) The same result would be reached on the same principles when the original petition asked for a recovery under the State statute as in the principal case and an amendment set forth the federal. *Jorgenson v. Grand Rapids & I. Ry. Co.*, *supra*; *M. K. & T. Ry. Co. v. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135. A peculiar situation arises when the petition brought in a State court specifies no statute, but after transfer to a federal court, an amendment is made asking for recovery under a statute of a State different than that in which the action arose. It would seem on the above principle that the amendment would not constitute a departure since the federal court takes notice of all State statutes; but an apparently different result was reached in the case of *Union Pac. Ry. Co. v. Wyler*, *supra*, where the court on similar facts held that the amendment stated a new cause of action. Generally, the courts have been liberal in allowing amendments and permitting them to relate back to the date of the petition so as not to be barred by the statute. This seems to be wise, since in most of the cases of this sort, the original petition was brought in plenty of time, the statute running out during extended litigation of doubtful points of law. For further comment see 33 Harv. L. Rev. 242 and 3 Minn. L. Rev. 132.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE DOCTRINE.—The plaintiff suffered injuries as a result of a collision with the defendant's carriage, and claims the defendant's negligence caused them. The plaintiff was a member of a party which was engaged in coasting upon a country road. Members of the party were stationed at the foot of the hill to give warning to persons coming in the opposite direction. The watchers shouted to the defendant as he started up the hill, but he claimed not to have understood them. The plaintiff's party gave warning of its approach by shouts and the light of an electric flash light. Had the defendant yielded half the road a collision would not have occurred. The plaintiff secured verdict and judgment in the lower court. Held, it was not error to refuse to direct a verdict for the defendant on the ground of lack of negligence in him or contributory negli-

gence on the part of the plaintiff; further, an instruction on the doctrine of Last Clear Chance was properly given. *Roennau v. Whitson*, 175 N. W. 849. (Iowa Sup. Ct.)

The opinion by Chief Justice Weaver is a thorough and able discussion of the points presented. The plaintiff and her party had rights on the highway equal to those of the defendant and his carriage. "So far as the highway is concerned, the law recognizes no favorites in its use." That coasting is not, of itself, such an act as to make the plaintiff's use of the highway unlawful, is borne out by the cases cited in the opinion, *Burford v. Grand Rapids*, 53 Mich. 98, 18 N. W. 571, 51 Am. Rep. 105; *Lynch v. P. S. Corporation*, 82 N. J. L. 712, 83 Atl. 352, 42 L. R. A. (N. S.) 865. The court finds evidence from which a jury could discover negligence on the defendant's part; likewise evidence from which exercise of due care on the part of the coasters could be found.

Assuming, however, a finding that the plaintiff was negligent, the court says the Last Clear Chance rule could apply. This is clearly right, under our decisions. The learned judge points out facts from which the jury could have found that the defendant had ample warning of the danger. That being found, the situation is one where the plaintiff, though negligent, is oblivious to his danger; the defendant has warning of his peril, has it within his power to avoid the injury by the exercise of due care, and fails to do so. The defendant need not fully appreciate the danger, if he should appreciate it, as a man of ordinary prudence, from the facts known to him. See "Iowa Applications of the Last Clear Chance Doctrine", 5 Iowa Law Bulletin 36, pages 42 and 48. In addition to the authorities there collected, see *James v. Iowa Central Ry. Co.*, 183 Iowa 231, 165 N. W. 999, cited in the principal case. This decision is squarely in point on the Last Clear Chance situation.

PRINCIPAL AND AGENT—LIABILITY OF AGENT TO THIRD PARTY FOR FRAUD—CONTRACT LIABILITY.—The plaintiff and his assignors were induced by the fraudulent representations of the defendant agent to enter into a contract for the purchase of lands. Within the knowledge of all the parties, the defendant acted throughout the transaction as agent for a disclosed principal. The plaintiff brought an action at law, joining the agent and his principal as co-defendants, and was permitted to recover from the agent the sums paid down on the contract. Held, that this was not error. "Where an agent by actual fraud obtains money, he may be made to restore it in a suit to rescind, though he is not a party to the contract, and though he has turned the money over to his principal." *Peterson v. McManus*, 172 N. W. 460. (Iowa Sup. Ct.)

Against the principal, equity and law courts provide concurrent remedies, in matters of fraud. In equity, the defrauded party may rescind and compel the restoration of what he parted with under the contract. At law, he may retain his contract and recover

damages for any tort committed within the scope of the agent's authority. 1 AMER. & ENG. ENCYC. LAW, 1158 *et seq.*

What is the agent's liability? In a tort action, he must respond in damages; agency neither increases nor decreases the individual's liability for his own tort. The instant case suggests the propriety of a contract action. In general, where an agent acts within the scope of his authority and for a disclosed principal, he is not liable in contract. 1 AMER. & ENG. ENCYC. LAW, 1129 and 1130. Exceptions are where the agent uses apt words to bind himself personally, deals for an undisclosed principal, or himself purports to be the principal. Many courts and texts say that the plaintiff may recover from the agent what he paid, in a suit to rescind the contract. The authorities cited for this proposition include *Campbell v. Hillman*, 54 Ky. 508; *Fidelity Funding Co. v. Vaughn*, 18 Okla. 13, 90 Pac. 34; *Hedden v. Griffin*, 136 Mass. 229. The first and last of these cases were tort actions, and no authority on the contract question; the second case was grounded upon the first. Beginning with the English case of *Sadler v. Evans*, 14 Burr. 1984, there will be found many strong expressions of opinion that in cases like the present the agent is not liable in contract. Among these, see *Wilson v. Rogers*, 1 Wyo. 51; *Hallet v. Gordon*, 122 Mich. 567, 81 N. W. 556; *Wimple v. Patterson*, 117 S. W. 1034. (Tex. Civ. App.)

The correct theory seems to be that where the agent has received money through fraud, duress, mistake, to which his principal is not entitled, he may be liable in a contract action for money had and received. *McDonald v. Napier*, 14 Ga. 89. The agent holds the money neither for himself nor for his principal, but for the plaintiff who mistakenly parted with it. As an incident of recovery in such action, the court may set aside and cancel the contract; but rescission does not furnish the nature and theory of the action. If the agent be innocent, his payment over is a proper disposition of the funds and will absolve him. If the agent has knowingly participated in the wrong, the question of his liability for payment over in the absence of notice has been difficult for the courts. Perhaps the greater number have denied recovery in such a case. *Butler v. Harrison*, 2 Cowp. 556; *Cox v. Prentice*, 3 M. & S. 348; *Greenway v. Hind*, 4 T. R. 553; *Bamford v. Shuttleworth*, 11 Adol. & Ellis 926; *Elliott v. Swartwout*, 10 Pet. 137; *McDonald v. Napier*, *supra*; *Shipherd v. Underwood*, 55 Ill. 475. On principle, however, it would seem that the agent, having money to which he knew his principal was not entitled, would be liable in an action for money had and received, regardless of what disposition he may have made of it. For a good case, see *Taylor v. Currey*, 192 Ill. App. 502.

TAXATION—COLLATERAL INHERITANCE TAX—IMPOSING TAX ON REALTY CONVERTED INTO PERSONALTY IN FOREIGN STATE.—A testatrix died domiciled in Iowa and owning land in Nebraska. The terms of the will necessitated the sale of a portion of the Nebraska

land for the payment of pecuniary legacies. Held, that the Nebraska land necessary to be sold was converted into personalty and subject to the Iowa inheritance tax. *In re Sanford's Estate*, 175 N. W. 506. (Iowa Sup. Ct.)

It is generally accepted that an inheritance tax is not a tax on property but upon the succession to property. *In re Estate of Stone*, 132 Iowa 136, 109 N. W. 455; *Plummer v. Coler*, 178 U. S. 115, 44 L. Ed. 998; *In re Bronson*, 150 N. Y. 1, 44 N. E. 707. The state of domicile of a decedent cannot impose such a tax on land situated in a foreign jurisdiction for the succession to real estate is governed by the law of its situs. *In re Handley*, 181 Pa. 339, 37 Atl. 587. But can the state of domicile levy the tax on personalty having a permanent situs in a foreign jurisdiction, and if so upon what theory? Two theories have been suggested: (1) that the law of the domicile governs as to the succession to personalty; (2) that the law of the domicile in conjunction with the law of the situs is controlling. The first is the generally accepted theory under which personalty in a foreign jurisdiction is taxed. *Appeal of Gallup*, 76 Conn. 617, 57 Atl. 699; *McCurdy v. McCurdy*, 197 Mass. 248, 83 N. E. 881. As a matter of logic it is incorrect, for it is only by permission of the state of the situs that the law of the domicile governs, and so in reality the law of the situs is the one that controls. Gray, J., in *Swift's Estate*, 137 N. Y. 77, 32 N. E. 1096. See discussion by Charles E. Carpenter, 31 Harv. Law Rev. 905, 920. Further, the law of the situs can provide that all personalty, regardless of the owner's domicile, shall be distributed, at the owner's death, in accordance with its own statutory rules. See HURD'S REV. STAT. OF ILLINOIS, 1917, C. 39, §1. The second theory is suggested by Wharton in his work on CONFLICT OF LAWS (3rd ed., §80), but has no support in judicial decisions. It is obviously erroneous for our whole problem in Conflict of Laws is to determine which of two laws governs and we cannot evade the issue by saying that both control.

The next question is whether the state of the situs of personal property can levy an inheritance tax when the owner died domiciled in another state. Three theories whereby it may do so are suggested: (1) that the law of the situs actually controls the succession to personalty; (2) that the law of the situs controls in conjunction with the law of the domicile; (3) that it is a tax on property in the state of the situs. Propositions one and two have already been discussed. The third theory although inconsistent with the view that an inheritance tax is a tax on the succession finds support in the cases, and may be upheld from the standpoint that the state of the situs has actual control over the property and is giving protection; the recognized equivalent for taxation. *Weaver's Estate v. Iowa*, 110 Iowa 328, 81 N. W. 603; *People v. Union Trust Co.*, 255 Ill. 168, 99 N. E. 377. As a matter of authority, the state of the situs of the property may levy an inheritance tax. *Allen v. National State Bank*, 92 Md. 509, 48 Atl. 78; *Callahan v. Wood-*

bridge, 171 Mass. 595, 51 N. E. 176; *Eichman v. Martinez*, 184 U. S. 578, 46 L. Ed. 697.

It is submitted that the state of the situs actually controls the succession to personalty and has actual control over the property, and that the tax should be levied only in that state. But it is clearly established by judicial decision that the state of the domicile may levy the tax as well as the state of the situs. *In re Hodges' Estate*, 170 Cal. 492, 150 Pac. 344; *Hopkin's Appeal*, 77 Conn. 644, 50 Atl. 657; *McCurdy v. McCurdy*, *supra*.

Admitting then, that the state of the domicile may levy the succession tax on personalty permanently situated in a foreign jurisdiction, may it also levy the tax on land in the foreign state converted into personalty by the doctrine of equitable conversion? It would seem that it could not do so unless the foreign state recognizes the doctrine of equitable conversion, for unless this is true it is still realty so far as that state is concerned. This point was not discussed in the present case. But even though the point were raised it would not affect the decision for Nebraska does recognize the doctrine of equitable conversion. *Chick v. Ives*, 2 Neb. (Unoff.) 879, 90 N. W. 751. The doctrine being recognized in Nebraska there is still the question of whether it should be applied for purposes of taxation. Massachusetts, New York and Illinois refuse to apply the doctrine for the purpose of imposing an inheritance tax as to property in foreign jurisdiction. *In re Swift's Estate*, *supra*; *McCurdy v. McCurdy*, *supra*; *Connell v. Crosby*, 210 Ill. 380, 71 N. E. 350. Pennsylvania does apply it. *In re Williamson's Estate*, 153 Pa. 508, 26 Atl. 246; *In re Handley's Estate*, 181 Pa. 339, 37 Atl. 587.

In this case the court relies upon the authority to impose the tax which is given by the statute. But the authorization of the statute is effective only if the property in the foreign jurisdiction be considered as personalty. If the property in Nebraska be considered as realty than an Iowa statute could not impose a tax upon it any more than could a judicial decision of the Iowa court. *In re Vanuxem*, 212 Pa. 315, 61 Atl. 876; *Bittinger's Estate*, 129 Pa. 338, 18 Atl. 132. The decisions refusing to apply the doctrine base their refusal on the ground that equitable conversion is a fiction of equity which is given no effect in courts of law. *Connell v. Crosby*, *supra*; *In re Swift's Estate*, *supra*. As to whether the land converted has sufficiently lost its character as real estate in the foreign jurisdiction to permit its being taxed as personalty in the state of domicile is a question admitting of some doubt. This case, supported by the Pennsylvania decisions, has clearly answered that question in the affirmative.

TELEGRAPHS AND TELEPHONES—LIMITATION OF LIABILITY IN INTERSTATE MESSAGES.—A in Chicago sent a message to B in Iowa. The telegram contained an offer of a position for ten weeks at thirty

dollars a week and stated that an acceptance must be made immediately. Due to negligent delay on the part of the company in delivering the telegram, B's acceptance was made too late. A stipulation on the back of the telegram limited the company's liability to fifty dollars for an unrepeatd message. An Iowa statute prohibited limitation of liability for negligence. Held, the sendee can only recover the fifty dollars stipulated in the contract between the sender and the company. *Klotz v. Western Union Tel. Co.*, 176 N. W. 825. (Iowa Sup. Ct.)

Three questions are involved: (1) does the State or federal law control; (2) does the limitation of fifty dollars come under the Amendment of 1910; (3) does it bind the sendee?

By an amendment to the Interstate Commerce Act effective July, 1910 (U. S. Comp. St. §8563 *et seq.*) telegraph companies were given the right to classify the service they offered (repeated and unrepeatd messages, etc.) and to establish just and reasonable rates based on this classification. Sole power to determine what constituted such just and reasonable charges was expressly vested in the Interstate Commerce Commission but no reference was made as to liability for negligence.

Consequently, the question arose—did this amendment cover the liability of interstate companies for negligence and hence supersede the rulings of all State courts on this point?

Many State courts held that the Amendment did not have this effect, basing their decisions on the ground that had Congress intended this result it would have made that intent clear. But the Act made no reference to any new liability and so the inference was that Congress did not intend to change existing State law. *Western Union Tel. Co. v. Southwick*, 214 S. W. 987 (Texas Civ. App.); *Warren Goodwin Lumber Co. v. Postal Tel. Co.*, 116 Miss. 660, 77 So. 601; *Western Union Tel. Co. v. Boegli*, 115 N. E. 773 (Indiana Sup. Ct.); *Bowman and Bull Co. v. Postal Tel. Co.*, 124 N. E. 851 (Ill. Sup. Ct.). Other courts to the contrary held that the Act did cover the liability of the companies for interstate messages and take it out of State regulation and control. *Western Union Tel. Co. v. Lee*, 174 Ky. 210, 192 S. W. 70, Ann. Cas. 1918 C 1033, note; *Rosher-Kingman-Herrin Co. v. Postal Tel. Co.*, 185 Pac. 947 (Wash. Sup. Ct.).

Such was the state of the law until December 8, 1919, when the Supreme Court of the United States in deciding the case of *Postal Tel. Co. v. Warren Goodwin Lumber Co.*, 40 Sup. Ct. 69, reversed the Mississippi court, *supra*, and held that the Amendment of 1910 did cover the question of liability of interstate telegraph companies. 4 Minn. Law Rev. 293. The reasoning of the court was to the effect that if contracts limiting liability were subject to the control of the divergent and perhaps conflicting State laws, the dominant purpose of the amendment, *viz.*, equality and uniformity of rates, would be defeated. And continuing, the court reasoned

that the power to establish reasonable rates carried with it the power to fix a reasonable limitation of liability where such rate was charged.

The *Warren* case might be distinguished from the principal case in that the former was a case of mistake in transmission while the latter involved negligent delay in delivery. In the case of mistake, repetition may correct the error and so perhaps a difference in rate between a repeated and unrepeated message would be justified. But repetition would rarely correct or prevent delay and consequently if the limitation of liability found in the ordinary telegraph contract is allowed to apply to delay the company will be excused from its own negligence. Some courts have said it is hard to believe the intent of the parties was to have such stipulation apply where the companies' own negligence made it impossible to repeat the message. *Box v. Postal Tel. Co.*, 165 Fed. 138, 28 L. R. A. (N. S.) 566; *Western Union Tel. Co. v. Lange*, 248 Fed. 656, 662-663, 14 Ill. Law Rev. 528. Compare the rule as developed in the Supreme Court governing common carriers of goods to the effect that the common carrier could not exempt himself from liability for his own negligence but could limit his liability for negligent loss to a purely nominal sum. On this, see the article by R. M. Perkins, 4 Iowa Law Bulletin, pp. 32 to 39.

And in like manner the case of *Western Union Tel. Co. v. Boegli*, 40 Sup. Ct. 167, decided Jan. 12, 1920, reversing the Indiana case *supra*, was a case of negligent delay in delivery and held that limitation of liability was put under federal control as the effect of the Amendment of 1910.

This is conclusive, and the instant Iowa case is in accord with these decisions.

But the Iowa case goes further and decides that the stipulation limiting liability in the contract between the sender and the company was binding on the sendee.

On this point some jurisdictions have allowed the sendee to sue in tort on a theory analogous to common carrier cases, that there has been a breach of a public duty by the telegraph company. The sendee can recover full damages, for his recovery has no connection with the contract between the sender and the company. *Wells v. Western Union Tel. Co.*, 144 Iowa 605, 617, 123 N. W. 371, 24 L. R. A. (N. S.) 1045, note; *Herron v. Western Union Tel. Co.*, 90 Iowa 129, 57 N. W. 696.

But most jurisdictions limit the liability of the company for damages to the terms of the contract between the sender and the company. Some base the limitation on the ground that the sendee's rights are those of a third party beneficiary and must be limited by the contract's terms. *Stone v. Postal Tel. Co.*, 31 R. I. 174, 76 Atl. 762. Others hold that the company is under a public duty but that duty is limited by the terms of the contract made by the sender with the company in so far as it is reasonable. If it is a reasonable contract as to the sender it is equally so as to the sendee. *Western*

Union Tel. Co. v. Daut, 42 D. C. App. 398, L. R. A. 1915 B 685; *Broom v. Western Union Tel. Co.*, 71 S. C. 506, 51 S. E. 259, 29 Yale L. J. 573.

In the instant case the court cites two lines of authorities, one going on the third party beneficiary theory, the other on the theory that the company is under a public duty which is limited by the contract between the sender and the company. But just which line of cases it relies on in reaching the decision is not made clear. The result is the same in either case. If the public desires protection, it will have to pay the higher rate for repeated messages. What new legal barrier a telegraph company will then interpose is an interesting question which time may be expected to answer.

WATERS AND WATER COURSES—ACCRETION—RIGHT OF ONE WHO BECOMES RIPARIAN PROPRIETOR BY WASHING AWAY OF ADJOINING LANDS.—A owned land bordering the Missouri River and B owned land directly behind A's. Gradually A's land was all washed away, so that B became a riparian owner, and then land where A's had been was built up again by accretion. Notwithstanding the fact that B's deed described his land by definite boundaries, it was held by the district court, in an action to quiet title, that B got title to the alluvium. A appealed. Held, that B was entitled to the land so formed. *Yearsley v. Gipple*, 175 N. W. 641. (Neb. Sup. Ct.)

Accretion is an increase or addition to riparian land gradually and imperceptibly made by alluvial formations of soil and sand. *County of St. Clair v. Lovington*, 23 Wall. 46; *St. Louis etc. Ry. Co. v. Ramsey*, 53 Ark. 314, 13 S. W. 931, 933. By "imperceptible" is meant that the progress cannot be seen while it is going on, but only by comparison at two distinct points of time. *Jeffries v. East Omaha Land Co.*, 134 U. S. 178.

It is well settled that the riparian owner takes title to any area added to his land by accretion. *Kraut v. Crawford*, 18 Iowa 549; *Cox v. Arnold*, 129 Mo. 337, 31 S. W. 592.

The only difficult question arising in the principal case is that B's land was described by definite boundaries and not as bordering on the river. A's contention was that, under these circumstances, B would not lose title to his land by any encroachment of the river and so he should not gain by any accretion. This contention is supported by the case of *Volcanic Oil Co. v. Chaplin*, 27 Ont. Law Rep. 34, wherein many cases, not all in point, are cited to support this doctrine. It is apparently recognized in the following cases: *Gilbert v. Eldridge*, 47 Minn. 210, 49 N. W. 679; *Ocean City Association v. Shriver*, 64 N. J. L. 550, 46 Atl. 690; *Town of Hempstead v. Lawrence*, 70 Misc. 52, 127 N. Y. Supp. 949. However, the weight of American authority is *contra* and is in accord with the instant case. *Welles v. Bailey*, 55 Conn. 292, 10 Atl. 565; *Peuker v. Canter*, 62 Kan. 363, 63 Pac. 617; *Widdecomb v. Chiles*, 173 Mo. 195, 73 S. W. 444; *Nebraska v. Iowa*, 145 U. S. 519, 12 Sup. Ct. 518. The result in these cases is correct according to all the theories in regard

to the ownership of accretion. The most satisfactory explanation of the result, and the one upheld in the principal case, is that the riparian owner must run all risks of loss from the action of the water, and so he should benefit by any additions. *Kraut v. Crawford, supra*. Another is that the fundamental riparian right of access to the water should be preserved. *Lamprey v. State*, 52 Minn. 181, 53 N. W. 1139, 1142. The instant case is correct on both principle and precedent.

WILLS—TIME OF ASCERTAINMENT OF CLASS NAMED—GIFT TO "LIVING HEIRS" OF ANOTHER.—One Coler made a will providing that his administrator convert all his real estate into money and divide the proceeds as later directed among ten. Louisa Robinson, the testator's sister-in-law, was named as one of the ten. Then follows a provision that, "Should any of the above named legatees be dead at the time of the distribution of the proceeds of my real estate, then said share shall go to his, her, or their living heirs." Louisa Robinson died testate before distribution was made under the Coler will. The contest was between the devisees under her will and her brother who was her sole heir. Held, that under the provisions of the will the heir took nothing. *Johnson v. Coler*, 174 N. W. 654. (Iowa Sup. Ct.)

The sole ground upon which the brother of Louisa Robinson could base his claim was that under the will there was a direct gift to him as heir of Louisa. It is not necessary to go into the question whether Louisa took a vested or contingent interest, for in either case, the brother would take nothing. So the only question is whether the testator intended by the use of the words, "living heirs", to make a direct gift to the heirs. The testamentary intention as found in the will controls, and rules of construction simply aid in determining what that was in the particular case. *Fulton v. Fulton*, 179 Iowa 948, 162 N. W. 253, L. R. A. 1918 E. 1080; *In re Moran's Will*, 118 Wis. 177, 96 N. W. 367.

Our court has held that where there was a devise to a widow for life, remainder to a son, and additional provision, that if the son die before distribution leaving issue, the estate should go to such issue, or in the absence of issue, to the heirs of such deceased son, that was "practically the same as a devise to him and his heirs". *Callison v. Morris*, 123 Iowa 297, 98 N. W. 780. On the authority of that case, which seems to lay down a correct rule, this will would have given Louisa an absolute fee, had the testator used simply the word "heirs". The question then is whether the fact that the testator used the words "living heirs" made a difference. It should not.

It is a fundamental doctrine that the word "heirs" in a will primarily is used in its legal and technical sense, and, unless the context shows a contrary intention, must be construed as meaning all those who in case of intestacy would be entitled by law to inherit on the death of the testator or ancestor named. *Aetna Life Ins. Co.*

v. *Hoppin*, 249 Ill. 406, '94 N. E. 669; *Nicoll v. Irby*, 83 Conn. 530, 77 Atl. 957; *Irvin v. Stover*, 67 W. Va. 356, 67 S. E. 1119. And where qualifying expressions are relied on to give the word "heirs" a meaning other than the technical one they must be so direct and unequivocal as imperatively to require such interpretation. *In re Beck*, 225 Pa. 578, 74 Atl. 607.

If the word "living" as used here referred to those living at the death of the ancestor, then the word "heirs" is used in its technical and legal sense. But if by inserting the word "living" the testator meant those living at the period of distribution, then the word "heirs" is a word of purchase and not of limitation and the heir would take as purchaser.

It is a general rule of testamentary construction that the death of the testator is the time at which the members of a class are to be ascertained in case of a gift to the testator's heirs, *Bullock v. Downes*, 9 H. L. Cas. 1, and cases cited in 33 L. R. A. (N. S.) 1, unless the intention of the testator to refer to those who shall be his heirs at a period subsequent to his death is plainly manifested in the will itself. *Kellett v. Shepard*, 139 Ill. 442, 28 N. E. 751; *Merrill v. Wooster*, 99 Me. 460, 59 Atl. 596. The seasons which support this rule of construction are, that it gives the words of description their natural and prima facie meaning; that such a mode of ascertaining the beneficiaries implies that the testator has exhausted his specific wishes by the previous limitations and is thereafter content to let the law take its course; and the preference of the law to construe a remainder as vested rather than as contingent.

The cases in which the testator has added qualifying expressions to the word "heirs" divide themselves up into four classes.

The first of these classes is where the word "then", the adverb of time, is attached to the description of the class. In such cases the word "then" indicates that the class was to be ascertained at the time pointed out, *i. e.*, at the period of distribution. *Long v. Blackall*, 3 Ves. 486, 4 Rev. Rpts. 73; *Wharton v. Barker*, 4 K. & J. 483, 4 Jur. N. S. 553.

The second class of cases is where words of futurity, but without the adverb of time, are attached to the description of the class, and in such cases it is uniformly held that the words must speak from the time of the testator's death. The use of words of description in the future is immaterial, since words to postpone the vesting in possession of an interest are naturally prospective. *Doe v. Lawson*, 3 East 278; *Holloway v. Holloway*, 5 Ves. 399.

The third class of cases is where the word "then" is used not in connection with the description of the class, but in connection with the time at which the estate is to come into possession. Here the general rule is that the class is to be ascertained at the testator's death. *Bullock v. Downes*, 9 H. L. Cas. 1; *Mortimore v. Mortimore*, L. R. 4 App. Cas. 448, 48 L. J. Ch. N. S. 470; *Stewart's Estate*, 147 Pa. 383, 23 Atl. 599.

The fourth class of cases is where the testator makes reference to

the Statute of Distributions. Such a reference is held to show that the persons intended by such limitations are those who answer the description at the time of the testator's death. *Doe v. Lawson*, 3 East 278; *Halloway v. Radcliffe*, 23 Beav. 163, 26 L. J. Ch. N. S. 401.

These authorities show that it takes clear and concise language showing an intention to the contrary to take a case out of the general rule, and where at all possible the class will be determined at the testator's death.

Though these are cases where the gift is to the heirs of the testator himself, they are analogous to cases in which the limitation over is to a class described as "heirs" or "next of kin" of some individual other than the testator himself. Jarman, after stating the general principle above enunciated as to the testator's own heirs, says that on the same principle, an executory gift to the heir of another person, vests as soon as there is a person who answers the description, namely at the death of the ancestor, and the intervention of a limited estate does not change the time for ascertainment of the class. JARMAN ON WILLS, (6th Ed.) page 1549; *Danvers v. Earl of Clarendon*, 1 Vern. 35; *Feltman v. Butts*, 71 Ky. 115. A number of American cases bear out the proposition that the same principles and reasons which lead to the rule where the gift is to the testator's own heirs, are equally applicable to cases where the gift is to the heirs of another person. They all show that the time of ascertainment of the class is the death of the ancestor. *Birdsall v. Birdsall*, 157 Iowa 363, 132 N. W. 809; *Coffin v. Jernegeen*, 189 Mass. 503, 75 N. E. 958; *Tomlinson v. Nicholl*, 24 W. Va. 148; *Arnot v. Arnot*, 75 N. Y. App. Div. 230, 78 N. Y. Supp. 20, unless the testator made it clear it was to take effect at a different time. *Lee v. McElvy*, 23 Ga. 129.

Aided by these rules of construction and by the intent of the testator as far as can be gathered from the will itself, the conclusion is that the testator must have meant heirs living at the death of the ancestor. That is the natural and ordinary use of the term and there is nothing in the will to take it out of the general rule.

In *Bryant v. Flanders*, 201 Mass. 373, 87 N. E. 574, the will gave a life estate to the widow, and after several specific legacies, gave the balance of the estate to the testator's living sisters. The court held that the testator meant either those living at his death, or at the date of the will, and not those living at the death of the widow. That being so, *a fortiori* in this case we can presume that what was meant here was heirs living at the death of the ancestor, which is in effect as if the word "living" were left out. The decision of the court on this point seems correct.

BOOK REVIEWS

INTRODUCTION TO THE LAW OF REAL PROPERTY—RIGHTS IN LAND. By Harry A. Bigelow, Professor of Law in the University of Chicago. Constituting Vol. 2 of Cases on Property in the American Casebook Series. West Publishing Co., St. Paul; pp. ix, 88 and xviii, 741.

Rights in Land is a reversion to volume two of Gray's Cases on Property. Waste is taken over from volume one of Gray. The subject of Franchises is omitted, the matter on Public Rights is considerably curtailed and the matter on Legal Enforcement of Covenants Running with the Land is considerably extended. There has also been a careful excision of old cases and a careful selection of new. But the subjects are essentially the same as in Gray and the space devoted to them the same.

It is to be doubted whether this return to Gray is a step in the right direction. Gray's casebooks were an admirable collection of the best cases to be found on the subjects that they covered but they were altogether too extensive for the amount of time devoted to property in the standard law course and there was much in volumes one and two for instance that was not adapted to the needs of first year students. This was especially true of the Introduction to the Law of Real Property but it was also true of rents and to some extent of covenants. Professor Bigelow has tried to meet this by writing a text to cover the Introduction and by suggesting that Professor Aigler's casebook be used with beginners and his volume be saved for the second year. In other words, Gray is to be shifted around to meet the needs of the situation. As Professor Bigelow admits, this is more or less jumping from the frying pan into the fire as there are parts of Professor Aigler's book that are no better adapted to first year work. To the reviewer, the true solution would seem to be that which was reached by Professor Warren in his Cases on Property. Professor Warren cut loose from Gray, worked his material into a casebook with the needs of first year men in mind, and achieved a distinct success in so doing. There is need of a casebook on property to fill the gap between Warren's Cases on Property and Kale's Cases on Future Interests and written with the needs of second year men in mind.

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CASES ON THE LAW OF EVIDENCE, selected from decisions of English and American Courts, by Edward W. Hinton, Professor of Law in the University of Chicago. St. Paul; West Publishing Co., 1919, pp. xxiii, 1098.

The lapse of nearly twenty years since the appearance of the second edition of Professor Thayer's Cases on Evidence, and the interval of thirteen years since Professor Wigmore's selection was issued, furnish sufficient justification for the publication of a new case book on this important branch of the law. The present volume, however, has much besides its timeliness to commend it. Professor Hinton's twenty years of successful practice at the bar, and his

many years of experience as a skillful and stimulative teacher of law, entitle him to speak with authority. The book bears the stamp of his ripened scholarship, his clear analytical mind and his sound good sense.

The cases are short and pithy. The facts are set forth with sufficient detail and clearness to enable the student to see the actual controversy before the court; thus the chief merit of the case system of instruction is preserved. It would not be necessary to comment upon this feature but for the fact that some of the later case books have pruned away the facts from many of the cases and have left the student with mere statements of abstract principles. Again, the present selection contains no lengthy "text-book" opinions; the average length of the cases is very nearly two pages. The teacher is thus given a wealth of concrete cases upon which to base the class-room discussion. The notes are excellent. Without cumulative citations, they serve to explain and amplify the text on minor points of detail. The editor's comments, rarely given, are always helpful.

Professor Hinton has departed but little from the analysis of his predecessors, but he has made some important changes in the arrangement of topics. On the whole, so far as one can tell without having tried them out, the changes are for the better. Burden of Proof, for example, seems a better point of departure than Judicial Notice, the first topic in Professor Thayer's selection. The most striking innovation which Professor Hinton has made is in taking up Witnesses before the Hearsay Rule. Logically, this seems sound, but if the class is unable to go over the entire book, there are strong arguments of expediency for leaving to the last the comparatively unimportant material on witnesses.

Some forty-four per cent of the cases were decided prior to 1850, and only about eighteen per cent are of 1900 or later. While the older cases are generally shorter, yet the time required in class for the analysis of an old case may be quite as long—is often longer—than that needed for the treatment of a more wordy recent one. While the historical development of the subject is by no means to be ignored, it is not clear why so large a proportion of the time of the class should be taken up in the study of cases decided seventy years or more before the book was published, especially in a branch of the law of which Mr. Justice Holmes has well said: "The rules of evidence in the main are based on experience, logic and common sense, less hampered by history than some parts of the substantive law". (*Donnelly v. U. S.*, 228 U. S. 243, Hinton's Cases, p. 570.)

The section on Judicial Notice would be enriched by omitting the case of 1581 applying a statute of 1371 as to tithes, and by including some reference, at least, to the novel and important use of judicial notice as a means of bringing economic and sociological information before the court in *Muller v. Oregon*, 208 U. S. 412. (1908.)

On the whole, the book is an excellent piece of work, and will more than achieve the editor's modest hope "that the result may prove reasonably satisfactory".

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